84-1139

Office-Supreme Court, U.S.
FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES D. BRENNAN, GERALD T. GRIMALDI, COURTLAND J. JONES, GEORGE C. MOORE AND GEROULD W. PANGBURN,

Petitioners,

v.

TINA HOBSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a national law enforcement program (here COINTELPRO) devised by a federal agency (here the FBI) constitutes a civil "conspiracy" encompassing any excesses that may have occurred in carrying it out, with the result that conspiratorial liability may be imposed on those few federal employees who become defendants in damage suits because they took actions pursuant to agency directives implementing the program?

2. Whether 42 U.S.C § 1985(3) reaches conspiracies aimed at a class or organization on account of its political views or activities?

3. Whether, in an action alleging that a government program constituted a conspiracy, the court may evaluate the immunity of the individual defendants by treating them as a group and by determining if the program as designed and implemented violated clearly established legal rights, or whether the court must instead make an individualized immunity inquiry with respect to each defendant to determine if his particular actions under the program violated such clearly established rights?

4. Whether under the federal doctrine of fraudulent concealment, the statute of limitations is tolled with respect to federal employees whenever they are alleged to have participated in a secret conspiracy or program devised by their agency, even if they took no affirmative steps to conceal the conspiracy after it had ended?

5. Whether under *Garcia v. Wilson*, certiorari granted October 1, 1984 (No. 83-2146), the local one-year statute of limitations applicable to actions for damage to the person or his reputation, should have been applied in this case rather than the local three-year statute of limitations applicable to actions not otherwise specified?

PARTIES TO THE PROCEEDING

Petitioners are Charles D. Brennan, Gerald T. Grimaldi, Courtland J. Jones, George C. Moore and Gerould W. Pangburn.

Respondents are Tina Hobson, Richard Pollock, David Eaton, Arthur Waskow and the Washington Peace Center.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a, *infra*) is reported at 737 F.2d 1. On August 17, 1984, the panel issued a second opinion, which is not reported, denying the petitions for rehearing. App. 196a, *infra*. The opinion of the district court (App. 131a, *infra*) is reported at 556 F. Supp. 1157.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1984. On August 17, 1984, the court denied timely petitions for rehearing (App. 200a, *infra*). On

November 8, 1984, the Chief Justice extended the time for filing a petition for a writ of certiorari to January 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the district court rested on 28 U.S.C § 1331.

STATUTES INVOLVED

(1) Section 2 of the Ku Klux Klan Act of 1871, now codified as 42 U.S.C. § 1985(3), states in pertinent part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(2) D.C. Code § 12-301(4) provides:

> Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues:
>
> * * *
>
> (4) for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment—1 year.

STATEMENT

This action for violation of constitutional rights arises from law enforcement activities pursuant to a program instituted by the FBI in 1967. In July 1976, eight plaintiffs who had been active in the civil rights movement or the peace movement, filed suit against members of the Federal Bureau of Investigation (FBI) and the District of Columbia Metropolitan Police Department (MPD). The suit alleged numerous violations of plaintiffs' First Amendment rights to free speech, assembly and association. The petitioners are five former or current Special Agents of the FBI who were held liable for violating plaintiffs' constitutional rights.

The sole focus of the suit was COINTELPRO, an FBI law enforcement program aimed at counteracting certain activist groups that the FBI deemed threats to national security. This program, which originated at FBI national headquarters, sought to neutralize and control certain dissident political groups and "their violent and illegal activities". App. 11a. "Stripped to its essentials, plaintiffs' claim is that defendants undertook an array of activities for the unlawful purpose of disrupting and impeding plaintiffs' lawful and peaceful efforts to protest Government policies." App. 95a. The suit alleged a series of three unlawful conspiracies, one within the FBI under COINTELPRO, one in the MPD and one between the two governmental agencies. App. 97a. Each purportedly sought to violate the plaintiffs' rights. Each plaintiff also alleged that his or her constitutional rights had been violated by individual defendants apart from the conspiracy (App. 5a).

Although the suit named thirty-nine FBI special agents as defendants, only five FBI agents remained in the case

at the time of trial.[1] Each of these five agents had worked in the FBI's Washington Field Office or its national headquarters and had been involved with COINTELPRO to some extent, although none were responsible for originating the program.

Charles D. Brennan was the Chief of the Internal Security Section in FBI headquarters from 1966 to 1970. There were eight supervisory levels above him in the FBI's chain of command. This section was responsible for supervising the field offices' investigations of subversive activity in the United States, including attempts by the Communist Party to infiltrate and subvert institutions and the illegal and violent activities of the New Left. From the summer of 1970 to September 1971, defendant Brennan was Assistant Director in charge of the Domestic Intelligence Division. In that position he had general supervisory authority over all aspects of the FBI's responsibility in the security area, including both investigating threats posed by subversive organizations and countering the espionage and sabotage activities of foreign intelligence agents working in the United States.

George C. Moore was Chief of the Racial Intelligence Section in FBI headquarters from 1967 until his retirement in 1974. As with defendant Brennan, there were at least seven supervisory levels above him in FBI headquarters. The Racial Intelligence Section was responsible for supervising the field offices' investigations of organizations and individuals engaged in causing riots and other forms of racial violence. The investigations included black organizations as well as white hate groups such as the Ku Klux Klan.

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[1] Nine of the agents were never served with process, five died before trial and twenty defendants were dismissed before trial.

Gerald T. Grimaldi was a Special Agent in the FBI's Washington Field Office, and from March 1968 to April 1970 was a member of the squad investigating organizations and individuals affiliated with the New Left. In addition to his other duties, which principally involved an investigation to determine whether the Students for a Democratic Society was engaged in violence, he was designated by his squad supervisor from 1968 to 1970 to be the COINTELPRO-New Left Coordinator. FBI headquarters required each field office participating in the COINTELPRO program to so designate one of its agents.

Gerould W. Pangburn was a Special Agent in the FBI's Washington Field Office assigned from early 1968 to April 1972 to investigate extremist and racial matters.

Courtland J. Jones served as the Security Coordinating Supervisor at the Washington Field Office from 1964 until his retirement in 1974. In this position, Jones reported directly to the Special Agent in Charge (SAC)[2] and had jurisdiction over nine squads comprised of approximately 200 agents and attendant support staffs. Of these squads, which were involved in many different forms of intelligence gathering, Jones took over direct supervision of only one, which was involved in counterespionage against the Soviet Bloc nations.

During this period, the daily work of the Washington Field Office was organized as follows. Individual FBI agents worked together in squads, or groups of approxi-

[2] The Washington Field Office, like all FBI field offices, was run by the resident Special Agent in Charge (SAC). All FBI agents in the office reported directly or indirectly to this individual, and the SAC reported to FBI headquarters. From 1967 to 1974, approximately six agents served as SAC for the field office.

mately twenty agents. Each squad had a designated squad leader and extensive support staff. The squads were organized along the lines of the subject matter of their investigations; they operated separately from other squads and were generally independent.

The case went to trial against the FBI agents and a number of Metropolitan Police Department defendants. After an extended trial the jury found in favor of plaintiffs and fixed damages against the defendants on the basis of conspiratorial and individual liability. The district court denied defendants' post-verdict motions to set aside the judgment.

The court of appeals reversed the judgments against the District of Columbia and against the individual officers of the MPD on the ground that there was insufficient evidence to support the inference that there was a conspiracy between the FBI and the MPD to deprive the plaintiffs of their constitutional rights. The court also held that the claims of three plaintiffs against the FBI agents were barred by the statute of limitations. In all other respects, the court of appeals affirmed the verdicts against the individual FBI agents and remanded for a reconsideration of damages.

REASONS FOR GRANTING THE WRIT

I.

Like *Hanrahan v. Hampton*, 446 U.S. 754, 763-64 (1980), which also involved COINTELPRO, this was "not ordinary litigation." *Id.* (Justice Powell, dissenting). The plaintiffs here, like the plaintiffs in *Hanrahan*, had as their target the FBI itself. *Id.* The decision of the court of appeals endorsed this strategy and did so by embracing a most pernicious concept—that a national program

devised by an agency of the federal government constituted a "conspiracy" with respect to any excesses that any federal officer or employee anywhere and at any time may have committed in carrying out that program. The sins of many thus become the sins of those few who are chosen as defendants in a civil rights conspiracy action. And it is those federal defendants who personally are to bear the financial burden of paying for whatever damages were suffered as a result of the program of the federal agency that employed them. This case involved COINTELPRO. ABSCAM, BRILAB, GREYLORD and others may be waiting in the wings.

It is, at once, an odd notion that COINTELPRO, which embodied legitimate law enforcement objectives,[3] could be considered an illegitimate conspiracy. Unlike the usual situation, membership in this conspiracy did not require agreement; regardless whether an agent agreed with COINTELPRO, he was deemed to have joined a conspiracy if he carried out FBI directives implementing the program. To impose conspiratorial liability on the basis of such a theory is intolerable and the courts have firmly refused to do so in closely related contexts.[4]

When, for example, there are multiple acts by officers or directors of a corporate body, but those acts constitute "the implementation of a single policy by a single

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[3] *Pratt v. Webster*, 673 F.2d 408, 421-22 (D.C. Cir. 1982).

[4] A conspiracy occurs only when the parties have reached "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *William Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981). No such meeting of minds transpires when a subordinate simply carries out directives issued by his superiors.

policymaking body," no conspiracy to violate civil rights under section 1985(3) can be found. *Girard v. 94th St. & Fifth Ave., Corp.*, 530 F.2d 66, 71 (2d Cir. 1976). An opinion by Justice Stevens, when he was sitting as a court of appeals judge, is to the same effect. In *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972), a case arising under section 1985(3), then-judge Stevens held for the court that the conspiracy requirement cannot be "satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm." 459 F.2d at 196. *Accord Baker v. Stuart Broadcasting Co.*, 505 F.2d 181, 183 (8th Cir. 1974); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952); Note, *Intracorporate Conspiraties Under 42 U.S.C. § 1985(c)*, 92. Harv. L. Rev. 470 (1978). Moreover, "[t]he lower federal courts agree that officers and employees of a single firm are legally incapable of conspiring among themselves or with their firm in violation of section 1" of the Sherman Act (15 U.S.C. § 1). Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982), citing numerous cases. *See also Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731, 2741 n.15 (1984).

Here there was a single policymaking entity—the FBI—and the actions of the five FBI defendants who went to trial were actions undertaken pursuant to COINTELPRO, which represented a nationwide program of the FBI. These FBI defendants neither planned nor originated COINTELPRO and they were certainly not in a position to order it ended. Whether they shared the intentions and desires of the program's originators is unknown and to the court below, irrelevant. Rather, the agents, on pain of losing their employment, either carried out, approved or failed to disapprove (App. 109a)

implementation of parts of the program by means that were not *per se* unlawful.

Unless the decision below is reversed, it will become far too easy to sweep individual federal agents into the net of a conspiracy when in reality what exists is an agency program in which excesses may have occurred. Time and again this Court has recognized that caution must be exercised whenever individual liability is sought to be imposed on federal employees for the constitutional violations they have committed. *E.g., Butz v. Economou*, 438 U.S. 478 (1978). Far more constraint is necessary and appropriate when damages are sought for harm suffered from a conspiracy encompassing a federal program. The imposition of conspirational liability upheld by the court below expands the bounds of potential damages so far and portends such dire consequences for those in the federal service that this case merits the Court's special attention.

II.

In *United Brotherhood of Carpenters and Joiners v. Scott*, 103 S. Ct. 3352 (1983) the Court held that a conspiracy motivated by a racially discriminatory animus was actionable under 42 U.S.C. § 1985(3) but that one motivated by an economically based animus was not. The Court withheld judgment on whether section 1985(3) reached "conspiracies aimed at any class or organization on account of its political views or activities" (103 S. Ct. at 3360). That significant question is squarely presented in this case.[5]

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[5] The issue is of great importance to the individual FBI defendants here because a judgment under section 1985(3) carries with it the possibility of an award of attorneys' fees under 42 U.S.C. § 1988.

The trial court in this case instructed the jury as follows (Tr., Vol. V, pp. 250-251) (emphasis added):

> To make defendants liable for injury which the conspiracy caused to others, plaintiffs must prove in this kind of case that the conspiracy discriminated with hostile intent against a group or class to which a plaintiff belonged because of the *political purposes and activities of that group or class*, with a view to singling out that group or class for interference with its rights equal to that of the general public to assemble or associate for political purposes.

In the face of this instruction, it was incumbent upon the court of appeals to decide the section 1985(3) issue. Rather than doing so, the court engaged in an extended discussion designed to show that the jury could have found, on the basis of communications from FBI headquarters and from the SAC in New York (App. 37a-39a), that COINTELPRO was not entirely based on political considerations, and had racial overtones (App. 40a). But the case was not presented to the jury on that basis and the jury made no findings in this regard. Wholly apart from whether it was permissible for the court of appeals to use the motives of others, including the New York SAC, to render these defendants liable (see pp. 6-9 *supra*), the court could not properly attribute to the jury a finding it was never instructed to make. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982); *Collins v. Signetics Corp.*, 605 F.2d 110, 115 (3rd Cir. 1979).

We need not dwell on the significance of the question thus presented under section 1985(3). In *Scott*, which was decided after the trial here, the Court reviewed the legislative history of that provision and was unable to conclude that politically motivated conspiracies were intended to be covered in section 1985(3), a question the Court termed "difficult." 103 S. Ct. at 3359. Moreover,

the Court warned that making such conspiracies actionable would have far-reaching consequences and result in expanding the coverage of section 1985(3) far beyond anything Congress could have imagined, particularly in cases based on violations of First Amendment rights. 103 S. Ct. at 3359-3360. Properly viewed, this is such a case and for the reasons stated in *Scott*, review by this Court is warranted.

III.

The court's refusal to recognize the immunity of the FBI defendants was in error and raises an issue worthy of this Court's consideration. In discussing the immunity question, the court failed to render any individualized judgment regarding the five FBI defendants. Although *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), which was decided after the trial, required that immunity be granted to the FBI defendants "insofar as *their* conduct" (emphasis added) did not violate clearly established constitutional rights, the court never determined whether this test had been satisfied with respect to each defendant. Instead, the court spoke in generalities about "the program," its alleged designs, its alleged purposes and its alleged transgressions, all of which the court attributed to the defendants as a group (App. 50a) because plaintiffs had charged the defendants with acting pursuant to an illegal program known as COINTELPRO (App. 46a).

Harlow adopted an objective standard for determining immunity claims:[6]

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[6] All parties and the court of appeals agree that the *Harlow* test controls this case.

> We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818. In focusing on the objective facts, the Court held that "the subjective element of the good faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial," but should be resolved on summary judgment. *Id.* at 815-16. This objective standard was necessary in view of "social costs" of such suits, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." 457 U.S. at 814. Litigated suits with the prospect of damages tend to "dampen the ardor of all but the most resolute . . . [public officials] in the unflinching discharge of their duties." 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.)). Moreover, determining immunity on the basis of subjective aspects of conduct had created "a background in which there often is no clear end to the relevant evidence." 457 U.S. at 817. Inquiries into subjective factors thus fostered extensive discovery and depositions, which were extremely "disruptive of effective government." 457 U.S. at 817.

Last Term, after the decision below, the Court reaffirmed the *Harlow* test. In *Davis v. Scherer*, 104 S. Ct. 3012 (1984), the Court stressed that "even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard." 104 S. Ct. at

3018. The immunity defense "recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Id.* at 3020. Immunity thus protects "officials with a broad range of duties and authority [who] must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office." 104 S. Ct. at 3021.

The court below found this an "easy case" (App. 47a), but it could reach that conclusion only by ignoring the principle of *Harlow* that immunity is concerned with individual responsibility. The court explained its refusal to consider that "no individual act [of the defendants] was illegal," on the basis that this "overlook[ed] plaintiffs' focus on the motives with which the defendants acted" (App. 46a n. 79). These motives were shown by the purpose and design of COINTELPRO and could be attributed, under the court's ruling, to each of the five FBI defendants in their roles as alleged members of a conspiracy.[7]

But the question under *Harlow* cannot be whether the program of a federal agency violated clearly established rights. Immunity flows to the individual defendant, not to a program. There is no way for an official to "be expected to know that certain conduct" engaged in by him would violate constitutional rights (*Harlow v. Fitzgerald, supra*, 457 U.S. at 819), if the conduct and

[7] See, *e.g.*, the court's conclusion: "In a case such as this one, in which the pleadings and proof disclose a program that at its tamest violated the narrowly defined associational rights expressly discussed in these cases, and which in fact extended beyond violations previously contemplated, the law was undoubtedly 'well-established.'" App. 50a.

plans of others are to be deemed his through the simple device of alleging a conspiracy. Moreover, making immunity determinations turn on the nature of "the program" or "the conspiracy" throws wide open the very doors *Harlow* meant to close. What could be more disruptive, time-consuming and costly than the type of "broad-ranging discovery and deposing of numerous persons" (457 U.S. at 817) entailed in examining, not an individual's motivation, but how a program of a federal agency was implemented? The extensive record in this case itself proves the point. In short, the court should have held that if a federal defendant's individual acts met the *Harlow* test, that was sufficient to confer immunity. But here, as we have stated, the court expressly refused to make such an individualized inquiry.[8]

Even if it were proper for the court to paint with the broad brush of conspiracy in determining the immunity question, the court erred in failing to determine under the *Harlow* objective test whether the conduct of each defendant, "as measured by reference to clearly established law," 457 U.S. at 818, was such that each defendant reasonably should have known that he was joining an illegal conspiracy. As we have earlier discussed, the law was far from clearly established in 1967—and indeed is not established today—that when a federal employee

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[8] For example, the court should have considered whether, under the *Harlow* objective test, defendant Pangburn's actions in investigating an organization, receiving information and having an informant (App. 106a-107a) and defendant Jones' actions in holding a supervisory position and failing to disapprove directives and suggestions (App. 107a-108a) violated clearly established constitutional rights so as to subject Pangburn and Jones to liability. As we have discussed, an individualized inquiry with respect to each agent-defendant is required.

follows directives implementing a federal program that involves excesses, he becomes party to a conspiracy in violation of constitutional rights (see p. 8 *supra*). The court thus erred in determining that the FBI defendants were not entitled to immunity in this case.

IV.

The main objectives of the alleged conspiracy were accomplished prior to 1973, but plaintiffs did not bring suit until July 1976, after the three-year period in the statute of limitations had expired.[9] The court of appeals nevertheless held that plaintiffs' suit was not time-barred because the federal doctrine of "fraudulent concealment" had tolled the running of the limitations period (App. 58a-77a). Although fraudulent concealment requires active misconduct beyond the alleged wrong, the court held that no proof of such misconduct was necessary because defendants had engaged in a secret conspiracy, which in itself was sufficient to suspend any limitations period until plaintiffs were given notice of the conspiracy (App. 58a-66a).

Federal officers carrying out the directives of their superiors rarely will be in a position to control whether or when public notice of their actions should be given so as to trigger, under the ruling of the court below, the running of the limitations period. This is particularly true for federal employees such as FBI agents who must perform many of their duties under the constraint of

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[9] App. 58a. The court of appeals held that "the three-year limitations period provided in D.C. Code § 12-301(8) (1981) controls this case." *Ibid.* See the discussion of this question at p. 22 *infra*.

confidentiality.[10] If such potential defendants to *Bivens* actions are to be denied repose, it should only be because of their own actions in affirmatively seeking to conceal their participation in a conspiracy that has run its course. Otherwise they are left at the mercy of changing political climates and administrations, never knowing if some superior in power years or even decades later, may chose to open the floodgates of litigation and the prospect of crippling personal liability for alleged conspiracies long since past but which, under the decision in this case, will remain potential causes of action, immune from the statute of limitations until some public revelation of the conspiracy starts the statute running. The devastating effect the court's ruling will inevitably have on the morale of those who serve in the federal government and the disruption of the lives of former federal officers such a ruling threatens are, we submit, reasons enough for this Court to review the ruling below.

But there is more. The court's decision conflicts with *Grunewald v. United States*, 353 U.S. 391, 399 (1957), and is not supported by the decisions of other courts of appeals. If allowed to stand, the decision below will emasculate the protection of statutes of limitations in all federal actions involving an alleged conspiracy to violate constitutional rights.

Statutes of limitations are primarily designed to ensure fairness to defendants. *Glus v. New York Central R.R.*, 380 U.S. 424 (1965). For more than a century, this Court has recognized that statutes of limitations are a vital part of any system of "enlightened jurisprudence,"

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[10] *See Pratt v. Webster*, 673 F.2d 408, 421-422 (D.C. Cir. 1982), holding that COINTELPRO documents were exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552).

that they are "favored in the law," and that they "promote repose by giving security and stability to known affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Because limitations periods are so essential, the federal courts borrow from analogous state statutes of limitations in *Bivens* cases, where no federal statute applies.

Under the federal doctrine of "fraudulent concealment," however, the running of a limitations period will be suspended if the defendant has gone beyond the substantive wrong and engaged in affirmative acts of concealment. *See Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1221 (1950). "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Wood v. Carpenter*, 101 U.S. 135, 143 (1879).[11]

In this case, however, the court held that it was unnecessary for plaintiffs to show affirmative acts of concealment beyond the wrong—that is, the conspiracy itself. The court reasoned that defendants had "construct[ed] a scheme that would remain secret"—the conspiracy—and therefore labelled the wrong "self-concealing." App. 66a. When there is such a "self-concealing" wrong, the court held, the limitations period does not run until the plaintiffs receive notice of the

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[11] *Wood* cited with approval a state case and described it thus: "It was held that the concealment all being previous to the accruing of the cause of action, something more than the silence of B was necessary to prevent the running of the Statute, and that the action was barred. The concealment, it was said, must be the result of positive acts." 101 U.S at 142.

conspiracy (App 66a).[12] The court failed to recognize, however, that all conspiracies are secret and that collaborators always agree, expressly or implicitly, to conceal facts in order to prevent detection. *Krulewitch v. United States*, 336 U.S. 440, 443-44, 445-46 (1949).

In *Grunewald v. United States*, 353 U.S. 391 (1957), this Court squarely rejected the reasoning employed by the court below to extend the statute of limitations in conspiracy cases. The Court in *Grunewald* pointed out that "every conspiracy is by its nature secret" and that this element of secrecy cannot be used to overcome the running of the limitations period because such a rule "would for all practical purposes wipe out the statute of limitations in conspiracy cases. . . ." 353 U.S. at 402.[13]

The decision below conflicts directly with *Grunewald*. In addition, the court's holding is at odds with the decisions of other courts of appeals. Although the number of cases applying the federal fraudulent concealment

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[12] The "self concealing" concept had, until this case, been limited to actions alleging fraud. In using the concept in a civil rights conspiracy case in order to overcome the statute of limitations, the court below disregarded the admonition of the court in *Prather v. Neva Paperbacks*, 446 F.2d 338, 341 n. 2 (5th Cir. 1971), that the "doctrine [of fraudulent concealment] should not be confused with the doctrine applicable where the gist of the action is fraud, and the concealment is inherent in the fraud."

[13] *See also Hall v. E. I. DuPont de Nemours & Co.*, 312 F. Supp. 358, 362 (E.D.N.Y. 1970):

> It is in the nature of a conspiracy that there be secrecy; mere nondisclosure or denial of the existence of a conspiracy does not constitute fraud or deceit for tolling purposes. If it did, the tolling exception to the statute of limitations would eclipse the basic statute itself.

doctrine are legion[14] and are far from consistent,[15] one thing is clear. Until this decision, no court of appeals had held that in conspiracy cases, statutes of limitation are suspended until plaintiffs have been given notice of the conspiracy, which is the result reached by the court below.

In support of its decision, the court relied on cases from the First, Second, Seventh, Eighth and Tenth Circuits. App. 61a n. 103. *King & King Enter. v. Champlin Petroleum Co.*, 657 F.2d 1147 (10th Cir. 1981), one of the cases the court cited, applied the fraudulent concealment doctrine in a price-fixing conspiracy case. Contrary to the decision in this case, the district court in *King & King* held that with respect to a secret conspiracy, plaintiffs must prove additional acts of fraudulent concealment and that the defendants' denial of the conspiracy would not be sufficient to invoke the doctrine. 446 F. Supp. 906, 911, 913 (E.D. Okla. 1978). The court of appeals in *King & King* expressly approved the district court's analysis. 657 F.2d at 1154-56. Moreover, the First Circuit does not agree with the decision here. In a civil rights conspiracy case not mentioned by the court below, the First Circuit held that when defendants do not fraudulently attempt to hide the conspiracy after it has

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[14] *See, e.g.*, the decisions discussed in Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 Geo. L. J. 829 (1983).

[15] *See, e.g.*, 3 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions 196 (3d ed. 1977) ("The case law is not well developed as to the precise proof which must be made in order to establish tolling of the statute of limitations through fraudulent concealment."). The court below itself recognized that "the case law reflects a variety of formulations to apply the concealment doctrine" (App. 61a).

ended, the bar of the statute of limitations cannot be overcome. *Hernandez-Jiminez v. Calero Toledo*, 604 F.2d 99, 102 (1st Cir. 1979). In still another recent decision, the First Circuit agreed with *Hall* (see note 13, *supra*) that the existence of a conspiracy is not sufficient to toll the statute. *Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984). In *Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979), which the court below also cited, the plaintiffs alleged that the defendants had engaged in affirmative acts of concealment by destroying evidence. The Second Circuit held that those allegations met the requirements of the fraudulent concealment doctrine. There is no indication that the Second Circuit in *Robertson* intended to overrule its earlier decision that in order to show fraudulent concealment plaintiff must prove that after the wrong has been committed, "some affirmative act of concealment frustrated [its] discovery" (*City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 461 (2d Cir. 1974)).[16] The cases cited from the Seventh Circuit (*Tomara v. Galt*, 511 F.2d 504 (7th Cir. 1975); *Sperry v. Barggen*, 523 F.2d 708 (7th Cir. 1975)) were traditional fraud actions[17] and did not hold that in other actions, such as an action based on conspiracy to violate civil rights, the statute is tolled because conspiracies are by nature secret. A recent decision of the same court indicates that the law is unsettled in the Seventh Circuit regarding whether affirmative acts of concealment must be shown. *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983). The Eighth Circuit case, *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir. 1970), was not a conspiracy case

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[16] See the discussion of this case in *Long v. Abbott Mortgage Co.*, 459 F. Supp. 108, 117-118 (D. Conn. 1978).

[17] See note 12 *supra*.

and did not purport to overrule *Kansas City v. Federal Pacific Elec. Co.*, 310 F.2d 271 (8th Cir. 1962), an antitrust conspiracy case in which the fraudulent concealment doctrine was discussed at length. The court held in *Federal Pacific*, contrary to the decision here, that under the doctrine the limitations period is to be tolled when "the parties who engaged in unlawful conduct (conspiracy or combination) are successful *through affirmative action*, in concealing the cause of action itself." 310 F.2d at 278.

As we have discussed, *Grunewald* rejects the rule adopted by the court below and the decisions of other court of appeals do not support it. If, in antitrust conspiracy cases, plaintiffs "must show more than the wrongful conduct that underlies the substantive cause of action" in order to toll the statute (Marcus, *supra*, 71 Geo. L. J. at 859), there is no reason why plaintiffs in constitutional tort actions based on an alleged conspiracy should not be required to do the same. Indeed there is every reason why federal defendants should be accorded such protection, which statutes of limitations historically have provided.

The opinion below contains no discussion of the running of the limitations period to bar individual liability of the FBI defendants. The court recognized, however, that "the record reflects extraordinary variety in the level of participation of each [FBI] defendant" (App. 106a). Regardless whether the court correctly held that, with respect to the alleged conspiracy, the fraudulent concealment doctrine was satisfied by the "self-concealing" nature of the wrong, the court should have ruled that individual liability was barred unless plaintiffs showed, with respect to each FBI defendant, that the defendant had himself affirmatively acted to conceal the particular actions for which he was held liable. The court rendered no judgment that all, or even any, of the defendants' acts

on which individual liability rested were "self-concealing." By its own terms, the court's ruling contradicts the principle it expounds—namely, that except with respect to self-concealing wrongs, the courts of appeals hold that proof of affirmative acts of concealment is necessary to overcome the bar of the statute of limitations. *See* App. 61a n. 103, and cases there cited.

V.

The decision below conflicts with *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984), certiorari granted (Oct. 1, 1984) (No. 83-2146). The court in this case borrowed the three-year limitations period in D.C. Code § 12-301(8) for claims not otherwise "specifically prescribed," rather than the one-year period in D.C. Code § 12-301(4) applicable to actions "for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment." App. 57a-58a. *Garcia* holds that for statute of limitation purposes, actions seeking redress for violation of constitutional rights shall be treated as actions "for injury to personal rights." 731 F.2d at 651. Accordingly, the court in *Garcia* looked to the state statute applicable to suits for "injury to the person or reputation." For the reasons stated in *Garcia v. Wilson*, the court of appeals in this case therefore should have applied D.C. Code § 12-301(4), which provides a one-year limitations period for intentional injury to personal rights and reputation.[18]

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[18] The difference between the one-year and three-year limitations period is significant here. Plaintiffs did not bring suit until July 1976. But they had received notice of COINTELPRO at least as early as November 1974 (App. 81a; see *United Klans of America v. McGovern*, 621 F.2d 152, 153-154 (5th Cir. 1980)). By the time they first brought suit the one-year period had therefore expired even if one assumes that the statute had been tolled under the fraudulent concealment doctrine.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted to review the judgment of the court of appeals.

Respectfully submitted,

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January 14, 1985

APPENDIX

APPENDIX

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Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2159

JULIUS HOBSON, et al.

v.

JERRY WILSON, THOMAS J. HERLIHY, JACK ACREE, CHRISTOPHER SCRAPPER, EDWARD JAGEN, JOHN MAHANEY & GEORGE SUTER, APPELLANTS

JOHN B. LAYTON, et al.

No. 82-2160

JULIUS HOBSON, et al.

v.

JERRY WILSON, et al.

CHARLES D. BRENNAN, COURTLAND J. JONES, GERALD T. GRIMALDI, GEORGE C. MOORE & GEROULD W. PANGBURN, APPELLANTS

No. 82-2221

JULIUS HOBSON, et al.

v.

JERRY WILSON, et al.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 82-2226

JULIUS HOBSON, et al.

WASHINGTON AREA WOMEN STRIKE FOR PEACE, APPELLANT

v.

JERRY WILSON, et al.

No. 82-2227

JULIUS HOBSON, et al.

ABE BLOOM, ARTHUR I. WASKOW, TINA HOBSON, DAVID EATON, SAMMIE A. ABBOTT, RICHARD P. POLLOCK, REGINALD BOOKER, WASHINGTON PEACE CENTER and WASHINGTON AREA WOMEN STRIKE FOR PEACE, APPELLANTS

v.

JERRY WILSON, et a

Appeals from the United States District Court for the District of Columbia

(Civil Action No. 76-1326)

Argued January 23, 1984

Decided June 8, 1984

Richard B. Nettler, Assistant Corporation Counsel, with whom *Judith W. Rogers*, Corporation Counsel (at the time the brief was filed), *Charles L. Reischel*, Deputy Corporation Counsel, and *Edward S. Schwab*, Assistant Corporation Counsel, were on the brief, for appellants,

Wilson, et al., in Nos. 82-2159 and 82-2221 and appellees in Nos. 82-2226 and 82-2227.

David H. White, of the Bar of the Supreme Court of Kentucky, *pro hac vice*, by special leave of the Court, with whom *J. Paul McGrath*, Assistant Attorney General, *Stanley S. Harris*, United States Attorney (at the time the brief was filed), *Barbara L. Herwig* and *Marc Johnston*, Attorneys, Department of Justice, were on the brief for Brennan, Moore, Pangburn and Grimaldi, appellants in No. 82-2160 and appellees in Nos. 82-2226 and 82-2227.

A. Raymond Randolph, with whom *Christopher L. Varner* was on the brief, for Jones, appellant in No. 82-2160 and appellee in Nos. 82-2226 and 82-2227.

Anne Pilsbury, with whom *Morton Stavis* and *Arthur B. Spitzer* were on the brief, for Hobson, et al., appellees in Nos. 82-2159, 82-2160, 82-2221 and appellants in Nos. 82-2226 and 82-2227. *Mary B. Pike* and *Herb Semmel* entered appearances for Hobson, et al.

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Before EDWARDS, SCALIA and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* EDWARDS.

EDWARDS, *Circuit Judge*: This case presents yet another chapter in the saga of the Federal Bureau of Investigation's notorious COINTELPRO operation. It is now clear that COINTELPRO has long been abandoned; but, as this case demonstrates, its victims have remained vigilant in seeking redress for past wrongs.

In 1976, several Washington area residents, who had been politically active in the late 1960s and early 1970s, brought suit in District Court claiming that certain of their constitutional rights had been violated. The plaintiffs sought damages and injunctive relief against numerous active and retired special agents of the Federal Bureau of Investigation (FBI) and members of the Metropolitan Police Department (MPD), as well as the District of Columbia itself. The amended complaint, filed October 28, 1977, alleged that each defendant had violated plaintiffs' constitutional rights, individually and through conspiracies, while plaintiffs engaged in lawful political protest against Government policies.[1]

Following a 17-day trial, over which Judge Oberdorfer ably presided, a jury returned verdicts against most of the defendants and in favor of most of the plaintiffs. The jury also awarded substantial compensatory and punitive damages: awards to the eight prevailing plaintiffs, against the thirteen defendants found liable, totalled $711,937.50.[2]

On appeal, defendants have raised a number of arguments. We have given every argument thorough consideration and, following a painstaking effort—including

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[1] I Joint Appendix ("J.A.") 130.

[2] In his thoughtful opinion addressing defendants' motions for judgment notwithstanding the verdict, Judge Oberdorfer concluded that the punitive damage awards against two MPD defendants were not supported by the evidence. *See Hobson v. Wilson*, 556 F. Supp. 1157, 1194 (D.D.C. 1982).

examination of the record, verdicts and decisions from the trial court, review of the parties' briefs and study of the relevant statutory and case law—we have reached the following conclusions: (1) the claims of three of the prevailing plaintiffs against the FBI defendants were barred by the statute of limitations, and the judgments in their favor cannot stand; (2) the evidence was insufficient to support findings of liability against the individual MPD defendants and the District of Columbia, and the judgments against them cannot stand; (3) the evidence was insufficient to support findings that the FBI defendants participated in a conspiracy *with MPD officials*, and findings of liability for their participation in a joint FBI-MPD conspiracy are reversed; (4) consistent with our holdings herein, the damages issues are remanded for further consideration; and (5) in all other respects the judgments at trial—including the findings of individual and conspiratorial liability against the FBI defendants—are affirmed, except for our remand for reconsideration of one issue raised on cross-appeal.

BACKGROUND

I. *Parties*

We begin with a brief review of the parties to this action. Because each plaintiff brings an individual claim, as well as conspiracy claims, against each defendant, it is crucial that we set forth clearly the role that each played during the relevant time period.

In the late 1960s and early 1970s, each plaintiff engaged in a variety of activities—such as organizing meetings and demonstrations, and publishing newsletters—to express disagreement with, and rally support against, certain national and local Government policies. Generally, they focused their efforts on three issues: military involvement in Vietnam, proposals to build a superhighway through the District of Columbia, and equal rights for Black citizens of the District of Columbia. Each individual plaintiff played a leadership role in one or more of these efforts.

Plaintiff Sammie Abbott, a graphic artist, organized and was active in the Emergency Committee on the Transportation Crisis (ECTC), a coalition of Black and White neighborhood associations that opposed freeway construction through the District of Columbia. Plaintiff Abe Bloom, an engineer, was especially active in antiwar organizations, such as the Washington Mobilization Committee (WMC) and the Washington Area Peace Action Coalition (WAPAC), which organized major antiwar demonstrations in the District of Columbia. Plaintiff Reginald Booker, a federal employee, worked with Mr. Abbott on the freeway issue, helped to organize the Black United Front (BUF), and tried to foster local Black opposition to the Vietnam war.

Plaintiff Tina Hobson, a federal employee, participated in the organization of antiwar demonstrations and worked with her husband, the late Julius Hobson, who was active in the Black United Front. Plaintiff Richard Pollock, a college student at the relevant time, was principally involved in antiwar protest, and was active in the Student Mobilization Committee and other antiwar organizations. Plaintiff the Reverend David Eaton, minister of All Souls Church, was one of the founders and leaders of the Black United Front and participated in planning the 1968 Poor People's Campaign, a major civil rights demonstration.

Plaintiff Arthur Waskow, a Fellow at the Institute for Policy Studies—a research center whose scholars focused on public policy, race relations and foreign policy—organized and spoke at several antiwar demonstrations. Plaintiff Washington Peace Center, an organization affiliated with the Society of Friends, participated in the organization of several antiwar demonstrations during the relevant period.[3]

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[3] Plaintiff Women Strike for Peace, another peace organization, has cross-appealed on several grounds in an effort to reverse the jury's finding against its claim. *See* Discussion section VIII, *infra*.

During the same period, defendants Brennan, Moore, Jones, Grimaldi and Pangburn were employed by the FBI. Defendant Charles D. Brennan was chief of the Internal Security Section in FBI headquarters from 1966 to 1970. From 1970 to 1971, Mr. Brennan was assistant director in charge of the Domestic Intelligence Division. In the former position, he was responsible for the FBI's COINTELPRO-New Left activity.[4] In the latter job, he had overall responsibility both for COINTELPRO-New Left and COINTELPRO-Black Nationalist.[5] Mr. Brennan apparently authored an FBI memorandum announcing the creation of COINTELPRO-New Left in 1968, and another memorandum bearing his name recommended termination of the program in 1971.

Defendant George C. Moore was chief of the Racial Intelligence Section in FBI headquarters from 1967 to 1974. The section supervised field office implementation of COINTELPRO-Black Nationalist. The internal FBI memorandum announcing COINTELPRO-Black Nationalist went out over his name.

Defendant Courtland J. Jones held a liaison position between the Washington Field Office (WFO) of the FBI and FBI headquarters. From 1964 to 1974, he was WFO security coordinator and supervised nine squads, including Squad 5 and Squad 7. Squad 5 initially handled both New Left and racial matters but subsequently was divided into two squads. Squad 5 then handled racial matters and COINTELPRO-Black Nationalist, and Squad 7 was responsible for the New Left and COINTELPRO-New Left.

Defendant Gerald T. Grimaldi was a special agent in the WFO from 1956 to 1971. From the mid-1960s to 1970, he was a member of Squad 7, which investigated persons and individuals affiliated with the New Left; and from 1968 to 1970, he was the designated COINTELPRO-New Left Coordinator. In April 1971, he became super-

[4] This program is discussed in Background section II, *infra*.

[5] *Id.*

visor of Squad 5, which handled racial matters and COINTELPRO-Black Nationalist.

Defendant Gerould W. Pangburn, a WFO Special Agent, was a member of Squad 7 in 1968, was then transferred to Squad 5, and was Squad 5 supervisor from 1972 to 1974. In both squads he handled investigations of alleged "racial extremists."

Plaintiffs also filed claims against MPD officials, as well as against the District of Columbia itself. Defendant Jerry V. Wilson was Chief of Police during the relevant period. Defendant Thomas J. Herlihy supervised the MPD Intelligence Division, and was responsible for its activities, until his retirement in 1973.

Sergeant Jack L. Acree and Lieutenant George R. Suter were successive supervisors in the MPD Security Information Unit of the Intelligence Division. Sergeant Acree was in the Unit from 1966 to 1972; Lieutenant Suter was assigned to the Unit from 1968 to 1970 and from 1972 to 1975.

Defendants Christopher Scrapper, Edward Jagen and John W. Mahaney were officers in the MPD Intelligence Division. Officer Jagen served undercover after 1971 and attended meetings of the Washington Area Peace Action Coalition (WAPAC) and the Peoples Coalition for Peace and Justice (PCPJ). Sergeant Scrapper supervised officer Jagen and other informants in the antiwar movement. Officer Mahaney supervised at least two undercover officers, one of whom obtained information on BUF and ECTC, the other of whom was active in two antiwar groups.[6]

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[6] The jury found in favor of these two Intelligence Division undercover officers, Harold Bynum and Ann Kolego-Markovich, who prevailed on their affirmative defenses. Defendants Wilson, Herlihy and the District were found liable to all plaintiffs, while other MPD defendants were found liable only to some plaintiffs.

II. *The Facts*

According to plaintiffs, the FBI defendants conspired with each other, with other FBI agents and with the District defendants [7] to impede plaintiffs' efforts to associate with others for the purpose of publicly expressing opposition to the Vietnam War, national and local Government race relations policies, and other Government actions. Many of the defendants' activities from which plaintiffs alleged they were injured were related to COINTELPRO, an FBI program begun in 1967 and discontinued in the early 1970s.[8] COINTELPRO had two components; one was COINTELPRO-New Left, which, as implemented, was a "vaguely defined and haphazard" [9] operation targeting people who opposed American involvement in the Vietnam War and other related policies of the national Government; the second was COINTELPRO-Black Nationalist, which, as implemented, was directed at people seeking improvement of civil rights for Black people. The goal and strategy of these secret programs are not in doubt: a memorandum prepared and circulated by one of the FBI defendants described the COINTELPRO-New Left program as follows:

> The purpose of this program is to expose, disrupt and otherwise neutralize the activities of this group

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[7] We use the term "District defendants" to refer to the individual MPD defendants and the District of Columbia.

[8] A Senate Report published in 1976 summarized the results of an investigation into federal domestic intelligence activities. The report discussed at length the FBI's covert actions in its COINTELPRO program and documented a wide array of tactics employed by the FBI; only a sliver of the actions documented were mentioned at trial. *See generally* SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 755, Book II (Intelligence Activities and the Rights of Americans), 94th Cong., 2d Sess. (1976) (detailing the scope of the COINTELPRO activities) [hereinafter "Senate Report"].

[9] *Id.* at 88.

> and persons connected with it. It is hoped that with this new program their violent and illegal activities may be reduced if not curtailed.[10]

The lack of any FBI definition of "New Left" apparently resulted in the targeting of almost every antiwar group, including those involved in legitimate, non-violent activities. *See* Senate Report, note 8, *supra*, at 88.

The purpose of COINTELPRO-Black Nationalist basically was the same as the New Left program. An airtel dated August 25, 1967 set forth the goals as follows:

> The purpose of this new counterintelligence endeavor is to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalist, hate-type organizations and groupings, their leadership, spokesmen, membership, and supporters, and to counter their propensity for violence and civil disorder.[11]

The lack of standards restricting the scope of this program, as with the New Left program, apparently led the FBI to investigate and target persons involved in non-violent political expression, regardless of their involvement in disorders. *See* Senate Report, note 8, *supra*, at 177.

Among the primary goals of COINTELPRO was the prevention of coalitions among Black Nationalist groups and between Black Nationalist groups and the predominantly White New Left. Thus, the COINTELPRO-Black Nationalist program was intended to "[p]revent the *coalition* of militant black nationalist groups,"[12] and to "[p]revent militant black nationalist groups and leaders from gaining *respectability*, by discrediting them to three

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[10] IV J.A. 1742 (memorandum from C.D. Brennan to W.C. Sullivan).

[11] IV J.A. 1726.

[12] IV J.A. 1732 (airtel from Director, FBI) (emphasis in original).

separate segments of the community." [13] Targets of these efforts included the Southern Christian Leadership Conference and the Student Nonviolent Coordinating Committee.[14] At least two plaintiffs were identified as Black Nationalists by the FBI and listed in the Agitator list of violence-prone people.[15] At the same time, the FBI sought to promote political differences within New Left organizations and between New Left and Black Nationalist organizations, and to exploit opportunities to foment animosity.[16]

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[13] *Id.* (emphasis in original). The memorandum continued,

> You must discredit these groups and individuals to, first, the responsible Negro community. Second, they must be discredited to the white community, both the responsible community and to "liberals" who have vestiges of sympathy for militant black nationalist [sic] simply because they are Negroes. Third, these groups must be discredited in the eyes of Negro radicals, the followers of the movement.

Id. at 1732-33.

[14] *Id.* at 1733.

[15] *See* IV J.A. 2049 (Booker), 2058-63 (Eaton); *see also* Senate Report, note 8, *supra*, at 89-90 (discussing the "Agitator Index," also known as the "Rabble Rouser" index; quoting memorandum defining Rabble Rouser as "a person who tries to arouse people to violent action by appealing to their emotions, prejudices, et cetera; a demagogue.").

[16] *See, e.g.*, IV J.A. 1796 (memorandum from WFO to Director, FBI, explaining that "WFO is continuing attempts to develop plans to utilize sources to promote political differences in New Left organizations, and also to turn Black Militant groups away from any alliance with the New Left groups."); IV J.A. 1794 (memorandum recounting WFO action, explaining, "Propaganda efforts will also be made to maintain the 'separativeness' of the blacks and the whites and to stimulate political attacks by the blacks against the 'Lilly white' New Left groups."); IV J.A. 1850 (memorandum from defendant Brennan recommending "approval for distribution under the Mass Media Program of a blind memorandum revealing evidence of the growing dissatisfaction of

Secrecy was of utmost importance to the programs, and memoranda establishing them and requesting specific suggestions from field offices for counterintelligence operations cautioned

> that the nature of this new endeavor is such that under no circumstances should the existence of the program be made known outside the Bureau and appropriate within-office security should be afforded to sensitive operations and techniques considered under the program.[17]

FBI memoranda make clear that special security precautions were taken to avoid public exposure, criticism and embarrassment. Leaflets and divisive publications prepared by the FBI were intentionally printed on unwatermarked paper and distributed in unmarked envelopes.[18] The Senate Report suggests that the FBI's recognition of the illegality of the COINTELPRO program merely led to a tightening of security, not termination of the program.[19]

COINTELPRO invited creative participation by agents in the field offices and spawned an extraordinary range

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militant blacks with the New Left," and observing, "In order to further split the black militants from the New Left, it appears that should this information be publicized it will create dissension within both the New Left and black militant groups.").

[17] *See, e.g.*, IV J.A. 1728 (airtel from Director, FBI).

[18] *See* IV J.A. 1850 (memorandum from defendant Brennan recommending distribution of "blind memorandum"); IV J.A. 1848 (FBI document warning, "Take all necessary steps to protect the identity of the Bureau as the source of these leaflets."); IV J.A. 1853 (WFO memorandum to headquarters explaining, "For the sake of security, WFO will have [The Rational Observer] printed by the Bureau on unwatermarked paper."); IV J.A. 1821 (airtel to WFO from headquarters, cautioning, "Make certain that these [housing forms] cannot be traced to the Bureau.").

[19] *See* Senate Report, note 8, *supra*, at 146.

of activities. The memorandum initiating COINTELPRO-Black Nationalist advised agents to whom it was addressed, "You are urged to take an enthusiastic and imaginative approach to this new counterintelligence endeavor and the Bureau will be pleased to entertain any suggestions or techniques you may recommend." [20] The result, as disclosed by the trial record, was at least four categories of activity interfering with plaintiffs' legitimate protest activities: (1) efforts to create racial animosity between Blacks and Whites; (2) interference with lawful demonstration logistics; (3) efforts to create discord within groups or to portray a group's motives or goals falsely to the public; and (4) direct efforts to intimidate the plaintiffs.[21] We set out below examples of each of these four categories, to provide a sense of the activities of which plaintiffs complain:

—The WFO prepared and distributed to "friendly media" false press releases calculated to tarnish the reputation of Julius Hobson [22] and create internal dissension within the ranks of BUF.[23]

—The FBI wrote a racially-inflammatory leaflet entitled "Give Them Bananas!", which it sent anonymously to BUF members. The leaflet was the result of FBI efforts to engender animosity between BUF and the New Mobilization Committee ("New Mobe"), an antiwar group, after the New Mobe received from the Black

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[20] IV J.A. 1728 (letter from Director, FBI).

[21] These characterizations appear in Brief of Appellees, p. 16. We believe the record plainly supports their summary and that the breakdown they offer facilitates understanding of the record.

[22] Mr. Hobson, who was active in civil rights, was originally a plaintiff but died prior to trial.

[23] IV J.A. 1833-45 (airtel from WFO to Director, FBI). The Black United Front was an organization of Black citizens and leaders.

community a demand for payment to support a November 1969 antiwar demonstration. The incident, referred to in the record as the "Head Tax" issue, began with a BUF suggestion that demonstrators each make a contribution; it escalated when the New Mobe received a letter from BUF demanding $25,000 to support the demonstration. Rev. Moore, whose typewritten name appeared at the bottom of the BUF letter, denied writing it. Whether the FBI forged the initial demand letter is in considerable dispute. No dispute exists, however, over the FBI's responsibility for the "Give Them Bananas!" leaflet, which purports to be the New Mobe's response. It bears a crude drawing of a black monkey with a banana, and reads in part,

> We consider you [Rev. Moore, whose name appeared on the initial demand letter] and your kind as black bandits and the most dangerous of the elements eating away at the movement. . . . Suck on your bananas, brother, and someday you might learn how to make a fire or build a wheel.[24]

—The FBI filled in with fictitious names and addresses WMC housing forms used by WMC to identify places to lodge visiting demonstrators; the goal was to have demonstrators at the 1969 Presidential inaugural ceremonies make "useless trips to locate nonexistent addresses" and create confusion.[25]

—The FBI interfered with a "counterinaugural demonstration" by infiltrating the parade marshals' walkie-talkie radio communications, countermanding orders and sending marchers outside approved demonstration areas.[26]

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[24] *See* IV J.A. 1827-29; 1846-49. Whether the evidence supports a conclusion that any particular defendant was responsible for this and other activities we postpone until our discussion on the merits.

[25] IV J.A. 1818-22 (airtels from WFO to Director, FBI, and from Director, FBI to WFO).

[26] II J.A. 968-70 (testimony of Gerald Grimaldi); IV J.A. 1823 (memorandum from WFO to Director, FBI).

—The FBI encouraged sources to "undertake leadership roles in the various factions and stimulate dissension among them." [27]

—The FBI published its own "student" newspaper, The Rational Observer, which attacked the American University student newspaper, The Eagle, as too radical. The FBI publication, which claimed to be published by students, urged students to seek an injunction against publication of The Eagle and to question the motives of those who opposed the war, and warned, "Remember, you will be faced with joining society upon completion of your academic training. Don't do anything in haste today which could cause you embarrassment tomorrow." [28]

—The FBI engaged in an intensive campaign of harassing interviews to intimidate politically active people and heighten their concern about the consequences of political activity.[29]

The record does not contain documentation of MPD activities during this period as extensive as that regarding FBI activities. The MPD Intelligence Division had informers in virtually every organization with which plaintiffs were involved—the New Mobe, WMC, BUF, ECTC, Institute for Policy Studies, WAPAC and both plaintiff organizations [30]—in furtherance of its stated mission to gather information on "persons, groups, and organizations whose activities might be detrimental to the proper functioning of local, state, or national govern-

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[27] IV J.A. 1794 (memorandum from WFO to Director, FBI); *see also* II J.A. 967 (testimony of Gerald Grimaldi).

[28] IV J.A. 1854-58 (reprint of The Rational Observer).

[29] IV J.A. 1946-48 (airtel from WFO to Director, FBI).

[30] III J.A. 1261-63 (testimony of Jack Acree); 1352 (testimony of Blanco Drummond, Jr.); 1372-74 (testimony of Christopher Scrapper).

ments." [31] The record contains testimony about efforts of these informants to disrupt the organizations with which they were involved. For example, evidence at trial indicated that an MPD informant acted as an agent provocateur and attempted to disrupt a peaceful demonstration at the United States Capitol,[32] that a vociferous demonstrator who was identified later as an MPD officer urged a crowd to disobey parade instructions given by plaintiff Abbott and instead to march to an area where police awaited,[33] and that MPD successfully encouraged informants to take private mailing lists and membership lists, and in one instance to break into an office at night to take a metal strong box.[34]

III. *The Causes of Action*

At trial, plaintiffs asserted that they were victims of three conspiracies to violate their civil rights, all actionable under 42 U.S.C. § 1985(3) (Supp. V 1981). They alleged that each of these conspiracies violated their First Amendment rights to assemble for peaceable political protest, to associate with others to engage in political expression, and to speak on public issues free of unreasonable Government interference.[35] The jury returned verdicts in favor of most plaintiffs on all three conspiracy claims. One civil conspiracy, the jury found, included the five FBI defendants; a second involved certain MPD defendants and the District of Columbia; a third implicated both FBI and District defendants.

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[31] IV J.A. 2088 (order prescribing structure, mission, functions and manpower of MPD's Intelligence Division).

[32] II J.A. 792-94 (testimony of Carol Cullum).

[33] II J.A. 911-914 (testimony of Sammie Abbott); 804-06 (testimony of Reginald Booker).

[34] *See* III J.A. 1393-94 (testimony from MPD hearings); 1272-80 (testimony of Melvin Winkleman).

[35] *See Hobson*, 556 F. Supp. at 1165-66.

Plaintiffs also filed *Bivens*[36] actions for damages directly under the Constitution, claiming that defendants had individually injured various plaintiffs in the exercise of their First Amendment rights.

IV. *The Special Verdicts*

The jury returned special verdicts and found most defendants to be liable to most plaintiffs on the basis both of individual and conspiratorial acts. All FBI and MPD defendants, as well as the District of Columbia, were found liable to plaintiffs Bloom, Abbott, Pollock, Waskow and Washington Peace Center. The five FBI defendants, the District, and Wilson and Herlihy of MPD were found liable to plaintiffs Hobson, Eaton and Booker. One plaintiff, Washington Area Women Strike for Peace, was found not to have been injured by any of defendants' activities.

All defendants were found liable for compensatory damages. In addition, all of the FBI defendants, and Wilson and Herlihy of MPD, were found liable for punitive damages.[37] Five plaintiffs recovered $93,750 each, and three recovered $81,062.50 each. Individual defendants' liability ranged from $75,000 to $9,375.[38]

DISCUSSION

The FBI defendants, District of Columbia defendants and FBI agent Courtland Jones separately appeal the judgments against them. Each of the defendant groups

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[36] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

[37] As to these defendants, the punitive damage award amounted to one-third of the total award. After trial, the District Court found there to be insufficient evidence to support the award of punitive damages against defendants Wilson and Herlihy. *See Hobson*, 556 F. Supp. at 1194.

[38] *See id.* at 1188-94.

raises issues particular to itself, as well as certain contentions that are common to all. We turn now to consider each argument.

I. *Liability Under Section 1985(3)*

As a threshold matter, all defendants challenge the applicability of section 1985(3) to this case, although on separate grounds. The D.C. defendants argue that the section does not apply to employees of the District of Columbia or to the municipality.[39] The FBI defendants contend that the class-based animus necessary to a section 1985(3) action was not established.[40] Finally, FBI defendant Jones argues that the section does not apply to federal officials or to acts occurring within the District of Columbia.[41]

A. *The Statutory Scheme*

We begin by considering the language of, and case law relevant to, section 1985(3). The provision reads,

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occa-

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[39] Brief of District of Columbia Appellants, p. 50.

[40] Brief of F.B.I. Appellants, p. 60 n.12.

[41] Brief of Appellant Jones, p. 32 n.*.

> sioned by such injury or deprivation, against any one or more of the conspirators.[42]

By its terms, therefore, the statute requires that a plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

It is by now well-established that the provision encompasses private conspiracies, and not just actions taken under color of state law. *See Griffin v. Breckenridge*, 403 U.S. 88 (1971). It is equally clear, in light of *Griffin*, that the provision does not apply to *all* conspiratorial tortious interferences with the rights of others, but only to those motivated by some class-based, invidiously discriminatory animus. *Id.* Thus, the Supreme Court has added a requirement of class-based animus to the list of elements set out above.

In *Griffin*, the seminal case establishing these principles, the complaint alleged that defendants, private persons, had conspired to carry out an assault "to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens." *Id.* at 103. Holding that the complaint stated a cause of action at the core of section 1985(3), the Court found it unnecessary to delineate the periphery of such actions. Consequently, because the alleged conspiracy in *Griffin* was motivated by racial basis, the Court did not have to consider whether non-racial discriminatory animus stated a cause of action under the statute.

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[42] 42 U.S.C. § 1985(3) (Supp. V 1981).

Similarly, the Court identified two constitutional sources of congressional power to reach the private conspiracy alleged in the case before it. First, the Court observed that section 2 of the Thirteenth Amendment enables Congress to impose liability on private persons for conduct "far beyond the actual imposition of slavery or involuntary servitude," *id.* at 105, and concluded that "Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men." *Id.*[43] Second, the Court noted that the right of interstate travel "is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference," *id.* at 105, and that plaintiffs had alleged interference with that right. Congress therefore unquestionably had the particular power to protect the right of interstate travel from private interference. The Court made clear that, in identifying these two sources of power, it did not mean to imply the absence of any others. *Id.* at 107.

Quite recently the Supreme Court revisited section 1985(3) and offered some guidance on the outer limits of the provision. In *United Brotherhood of Carpenters and Joiners v. Scott*, 103 S. Ct. 3352 (1983), the Court reviewed an action brought by a construction company and two of its employees, principally against a number of unions and their members. The complaint alleged that defendants had conspired to deprive plaintiffs of their

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[43] Precisely the same argument provides a constitutional basis for our application of § 1985(3). We therefore have no need to conduct an independent inquiry, as the *Griffin* Court would appear to require in other contexts. *See Griffin*, 403 U.S. at 104 (Court's inquiry need only go to identifying a source of congressional power to reach the private conspiracy alleged by the complaint in the case before it).

legally protected rights, contrary to 42 U.S.C. § 1985(3) (Supp. V 1981), by planning and executing attacks on persons and property at a construction site known to employ non-union workers. The Court held, first, that an alleged conspiracy to infringe First Amendment rights is not a violation of section 1985(3) "unless it is proved that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state." *Id.* at 3356-57. On this point, the Court observed that the First and Fourteenth Amendments protect the individual against state action, not against wrongs committed by individuals, and it made clear that a section 1985(3) conspiracy to violate either of these constitutional provisions is not made out without some proof of state involvement. At the same time, the Court reaffirmed that the interpretation of the section is not *generally* limited by the state action constraints of the Fourteenth Amendment; section 1985(3) in fact applies to wholly private conspiracies as long as they are aimed at interfering with rights constitutionally protected against private as well as official encroachment—such as the Thirteenth Amendment and the right to travel. In other words, the rights protected by section 1985(3) exist independently of the section and only to the extent that the Constitution creates them. Thus, when state action is involved, the whole spectrum of rights against state encroachment that the Constitution sets forth comes into play. When no state action is involved, only those constitutional rights that exist against private actors may be challenged under the section.

The Court in *Scott* also considered the kind of class-based animus that is encompassed by the section and rejected the notion that the section forbids conspiracies against workers who refuse to join a union. More generally, the Court held that the provision was not intended to reach conspiracies motivated by bias toward others on account of their *economic* views, status or activities, *id.* at 3360, or, put another way, motivated by economic or commercial animus.

At the same time, the Court in *Scott* reaffirmed, on the basis of the applicable legislative history, that section 1985(3) was intended at a minimum to reach animus against Blacks *"and those who championed their cause, most notably Republicans," id.* at 3359 (emphasis added). Whether it also reached "wholly non-racial, but politically motivated conspiracies," *id.* at 3359, was dubbed a difficult question and was not reached.[44]

It is against this background that we consider defendants' arguments that the District Court erroneously permitted plaintiffs to proceed with their section 1985(3) claims.

B. *Applicability of Section 1985(3) to the District of Columbia and Its Employees*

The District of Columbia argues that section 1985(3) does not apply to the District of Columbia or its employees. For this proposition it offers no analytical support, but rather rests on a passing and conclusory remark in an opinion from this Circuit to the effect that section 1985 "has never been applicable to District employees." [45] We disagree. Nothing in the statute or in

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[44] The Court acknowledged support in the legislative history for the view that § 1985(3) broadly extends to purely political animus, to reach conspiracies formed because a person "was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter." *Scott*, 103 S. Ct. at 3360 (quoting Cong. Globe, 42d Cong., 1st Sess. 567 (1871)). At the same time, it reiterated that the central concern of the statute was to combat "the violent and other efforts of the Klan and its allies to resist and to frustrate the intended affects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Id.* The Court withheld judgment on other alleged forms of animus that would fall within the statute's reach.

[45] *Boykin v. District of Columbia*, 689 F.2d 1092, 1099 (D.C. Cir. 1982).

Plaintiffs in *Boykin* brought an action against the District of Columbia alleging that a police officer had wrongfully shot

Supreme Court opinions supports the view put forth by defendants. For the following reasons, we hold that the District and its employees may be sued for damages under section 1985(3).[46]

The District defendants do not offer any rationale for their proposed limitation on the reach of section 1985(3), and we therefore must undertake an independent inquiry into the possible bases for that argument. The proposed limitation has two possible sources: either it is an inter-

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and killed their son. The two police officers involved in the son's apprehension and shooting were not made parties to the suit. The complaint presented six claims for relief, five of which were pendent local common law claims. The federal claim alleged that the District had deprived plaintiffs' son of rights secured by 42 U.S.C. §§ 1983, 1985 and 1986 (1976 and Supp. IV 1980), and by the Fourth and Fifth Amendments. The District Court dismissed the action for lack of subject matter jurisdiction, and a panel of this Circuit affirmed, although disavowing the District Court's jurisdictional analysis. The court ruled that the District of Columbia could not be liable, under a theory of *respondeat superior*, for federal claims of the kind brought by plaintiffs, and, consequently, that the complaint failed to state any federal claim for which relief could be granted. The panel reached this result relying on, and extending, *Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982), which had held that municipalities could not be liable under a theory of *respondeat superior* in a constitutional tort action.

At the same time, the court in *Boykin* observed in passing that § 1985 had never applied to District employees; in offering this conclusion, the court cited only the District Court opinion and *District of Columbia v. Carter*, 409 U.S. 418 (1973), which addressed quite distinct concerns. Unlike the situation in *Boykin*, we are required in this case to give full consideration to questions concerning the reach of § 1985. Because of the importance of these issues, and because of some possible confusion engendered by our prior case law, we have found it necessary to revisit and reconsider that portion of *Boykin* pertaining to the applicability of § 1985(3).

[46] This holding has been considered and approved by the full court and thus constitutes the law of the Circuit. *See Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

pretation of the geographical limit contained in that section—the section by its terms encompasses conspiracies acted upon "in any State or Territory"—which, arguably, was intended to eliminate from the scope of the statute all conspiracies formed in the District of Columbia; or it might be a confused analogy to section 1983 case law, holding that the District of Columbia is not a "State or Territory" within the meaning of 42 U.S.C. § 1983.[47]

The Supreme Court has twice construed the phrase "any [or every] State or Territory" as used in the civil statutes of the 1860s and early 1870s. In *Hurd v. Hodge*, 334 U.S. 24, 31 (1948), the Court ruled that the phrase, as used in 42 U.S.C. § 1982 (1976), includes the District of Columbia. That section, which first appeared as section 1 of the Civil Rights Act of 1866, provides:

> All citizens of the United States shall have the same right, *in every State and Territory*, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.[48]

In *District of Columbia v. Carter*, 409 U.S. 418 (1973), the Court reached the opposite conclusion when construing 42 U.S.C. § 1983 (current version at 42 U.S.C. § 1983 (Supp. V 1981)). At the time,[49] that section provided in pertinent part, "Every person who, *under color of any statute . . . of any State or Territory. . . .*" The Court concluded that the District of Columbia was not a "State or Territory" within the meaning of that language.

To determine the meaning of the phrase "State or Territory" as it is used in section 1985(3), we track the

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[47] *See District of Columbia v. Carter*, 409 U.S. 418 (1973).

[48] 42 U.S.C. § 1982 (1976) (emphasis added).

[49] Following the Supreme Court's decision in *Carter*, Congress amended the section to include the District of Columbia. *See* Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979).

analysis in *District of Columbia v. Carter* and test for divergence. Initially, however, it is crucial to note that section 1985(3) is facially more akin to section 1982—which has been construed to encompass the District—than to section 1983. Sections 1982 and 1985(3) both use the "State or Territory" phrase as a geographical limit (unlike section 1983); consequently, to exclude the District of Columbia from their scope is to create an inexplicable safe haven in the District for persons—both private and official—who would be liable elsewhere. In contrast, the "color of law" requirement in section 1983 (which is not found in either sections 1982 or 1985(3)) implicates federalism issues not relevant to our inquiry; therefore the case law construing section 1983 offers a less compelling analogy. In other words, to draw lines on the basis of source of authority is to recognize a coherent distinction, whereas to draw lines on the basis of place of action is to be impractical, as *Hurd v. Hodge* made clear.

The issue is somewhat complicated, however, by the fact that sections 1982 and 1983 originated in two different acts, each with a different purpose. Section 1985(3) first appeared in the Ku Klux Klan Act of 1871,[50] as did section 1983, whereas section 1982 appeared earlier, in the Civil Rights Act of 1866.[51] This difference in origin was central to the *Carter* Court's analysis of sections 1982 and 1983. Thus, after explaining that section 1982 was enacted to enforce the Thirteenth Amendment's nationwide prohibition against slavery and involuntary servitude, the Court explained,

> The situation is wholly different, however, with respect to § 1983. Unlike § 1982, which derives from the Civil Rights Act of 1866, § 1983 has its roots in § 1 of the Ku Klux Klan Act of 1871, Act of Apr. 20, 1871, § 1, 17 Stat. 13. This distinction has great significance, for unlike the 1866 Act, which was

[50] Act of Apr. 20, 1871, ch. 22, § 2, 17 Stat. 13, 13-14.

[51] Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27.

> passed as a means to enforce the Thirteenth Amendment, the primary purpose of the 1871 Act was "to enforce the Provisions of the Fourteenth Amendment." 17 Stat. 13; . . . And it has long been recognized that "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources."

409 U.S. at 423. Since section 1985(3) also derives from the Ku Klux Klan Act of 1871, arguably the same limits apply to its interpretation as to that of section 1983, in particular the limits imposed by the Fourteenth Amendment. In that case, it might be contended that the District of Columbia would not be within section 1985(3)'s purview, as it was not within that of section 1983, simply because the District is not a State within the meaning of the Fourteenth Amendment, *see Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Morgan v. District of Columbia*, 550 F. Supp. 465, 470 (D.D.C. 1982) (reaching this conclusion), *aff'd without opinion*, 725 F.2d 125 (D.C. Cir. 1983). If we were to read into section 1985(3) the limits imposed by Fourteenth Amendment analysis, as the *Carter* Court read them into section 1983, the result would be to remove from the scope of section 1985(3) all conspiracies acted upon in the District, by whomever planned, not simply or even necessarily conspiracies in which the District or its employees participate. The problem with this analysis is that there is no more reason to read the word "state" as being limited by the scope of the Fourteenth Amendment than there is to read the nature of the conspiracies described in section 1985(3) as limited by that concept—so that only conspiracies under color of state law would be covered. The two would seem to go *pari passu*. But the latter interpretation has been conclusively rejected by the Supreme Court. *See Griffin v. Breckenridge*, 403 U.S. 88 (1971).

By interpreting section 1985(3) to encompass private conspiracies, the Court in *Griffin* necessarily eschewed an

extension of the Fourteenth Amendment's limitations to section 1985(3). The holding in *Griffin* is wholly inconsistent with the limited commands of the Fourteenth Amendment, which constrain only the States and those acting under color of State authority. Similarly, in *Scott* the Court explicitly reaffirmed the proposition that section 1985(3) encompasses wholly private conspiracies and unequivocally stated that "the section is not limited by the constraints of the Fourteenth Amendment."[52] Accordingly, while the *Carter* Court found persuasive section 1983's Fourteenth Amendment origins, and relied on those origins to read into section 1983 limitations on its reach, Supreme Court decisions construing section 1985(3) point in precisely the opposite direction. With express Supreme Court direction not to apply Fourteenth Amendment analysis to the construction of section 1985(3), we can perceive no reason to interpret the provision as the Court interpreted section 1983, where a contrary rule controlled.

Nor do we find persuasive for our purposes any other argument put forth in *Carter* to limit section 1983's reach in the District. In fact, the remaining factors point toward construing section 1985(3) to cover District employees. The *Carter* Court observed that unlike section 1983, section 1982 was intended to reach private parties, to act as "an 'absolute' bar to *all* such discrimination, private as well as public, federal as well as state." 409 U.S. at 422. "With this in mind," the Court concluded, "it would be anomalous indeed if Congress chose to carve out the District of Columbia as the sole exception to an act of otherwise universal application," *id.*, particularly when the "dangers of private discrimination . . . were, and are, as present in the District of Columbia as in the States." *Id.* Precisely the same analysis applies to section

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[52] *Scott*, 103 S. Ct. at 3357-58.

1985(3), which applies to all conspiracies, whether public or private, and the *Carter* argument quite clearly counsels against "carving out" the District of Columbia. We have no reason to believe private persons in the District are any less capable than persons elsewhere of participating in conspiracies of the kind addressed in section 1985(3).

On the basis of the Court's analysis in *Carter*, we conclude that *none* of the reasons offered for eliminating the District from the scope of section 1983 applies to section 1985(3) or counsels reaching the same result. In light of the Supreme Court's direction not to read Fourteenth Amendment restraints into section 1985(3), we would be remiss to limit the reach of that section and exempt the District and its employees. In the firm belief that *Hurd v. Hodge* and the analysis contained therein controls this case, we reject defendants' proposed limitation on section 1985(3).

C. *Applicability of Section 1985(3) to Federal Officers*

We turn next to consider defendant Jones' contention that section 1985(3) does not contemplate actions against federal officers. The apparent source of this argument is an antiquated decision of the Second Circuit, whose holding has repeatedly been read out of context by District Courts, and has now effectively been overruled by the Supreme Court. Accordingly, we reject Mr. Jones' argument and hold that section 1985(3) encompasses actions against federal officers, subject, of course, to considerations of qualified immunity.

Initially, we note that this Circuit has previously permitted actions to be brought under section 1985(3) against federal officers. *See Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977) (White House official may be liable in section 1985(3) action). As a result, we pause here only to resolve any lingering doubts about the rationale of the law of this Circuit, not to decide what the

law should be. Because the law in this area for years was based on conclusory, unsupported statements, and misguided interpretations of an unfortunately cryptic opinion, we want to make absolutely clear the basis of our decision.

The source of confusion is *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950), a delphic opinion by Judge Learned Hand, which has repeatedly been cited for the proposition that section 1985 (3) does not contemplate suits against federal officers. *See, e.g., Lofland v. Meyers*, 442 F. Supp. 955, 957 (S.D. N.Y. 1977); *Williams v. Halperin*, 360 F. Supp. 554, 556 (S.D.N.Y. 1973). In *Gregoire*, the Second Circuit affirmed the dismissal of a complaint against Francis Biddle, the Attorney General, and other federal officials, to recover for false arrest as an enemy alien. The complaint was grounded, *inter alia*, on the Civil Rights Act, including section 47(3), now 1985(3). The court began its analysis by summarizing a decision of that Circuit, affirmed by the Supreme Court, which had held United States Attorneys absolutely immune from a civil action for malicious prosecution. The Supreme Court, in affirming, cited to earlier cases establishing absolute immunity for judges for acts done in the exercise of their judicial function.[53] Judge Hand concluded that the Court's affirmance of the circuit court established absolute immunity for officers of the Department of Justice, when engaged in prosecuting private persons. 177 F.2d at 580. Defendants in *Gregoire* were officers of the Justice Department engaged in prosecuting a private person. Accordingly, *Gregoire* held only that the common law grants executive officers engaged in prosecution an absolute privilege from civil actions, not that *all* federal officers are thus sheltered. It concluded that, absent any indication

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[53] *See Yaselli v. Goff*, 275 U.S. 503 (1927) (citing *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) and *Alzua v. Johnson*, 231 U.S. 106, 111 (1913)).

that Congress intended to remove that immunity, the complaint required dismissal.

It was in this context that *Gregoire* turned to consider the Civil Rights Acts, presumably to determine whether they were meant to waive prosecutorial immunity. Judge Hand rejected plaintiff's argument that then-section 47 (3), currently section 1985(3), created a claim against *any* two people, including federal officers, who conspire to injure another for spite or improper motives, or, in other words, rejected a reading of the section that would transform it into a general federal tort law. He remarked, "it is apparent that [the words] could not have had such a scope without destroying their validity constitutionally." *Id.* at 581. Regardless whether Judge Hand was more concerned with the idea of private conspiracies under the statute or federalization of tort law, it is now clear that neither of these factors necessarily poses any obstacle to the section's constitutionality. In light of *Griffin*, which both established the constitutionality of the very statutory construction rejected by Judge Hand—that the conspiracy statute applies to wholly private conspiracies—and read into the statute a requirement of class-based discriminatory animus to assure the statute was not a general tort provision, Judge Hand's construction of the statute on these issues no longer merits consideration.

It is therefore apparent that cases relying on *Gregoire* to preclude suits against federal officials under section 1985(3) have no present force. First, these cases always have been in error to the extent they read into *Gregoire* an absolute privilege for persons other than prosecutors. Second, these cases have in any event been superseded in their analysis of section 1985(3), along with *Gregoire* itself, by *Griffin*. We have not found either in case law or in the language of the statute any reason to exclude all federal officers from the meaning of the word "persons" in section 1985(3). Pre-*Griffin* cases therefore are of no precedential weight on this point, and post-*Griffin*

cases that rely only on *Gregoire*, or on other cases citing only *Gregoire*, without any mention of *Griffin*, similarly should not be followed.

Considerable recent case law rejects the proposed limitation on section 1985(3) and supports our conclusion. *See Jafree v. Barber*, 689 F.2d 640, 643 (7th Cir. 1982) (section 1985(3) action against federal officer states cause of action); *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (same); *Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926, 931 (10th Cir. 1975) (same); *Bergman v. United States*, 551 F. Supp. 407, 414-15 (W.D. Mich. 1982) (same); *Peck v. United States*, 470 F. Supp. 1003, 1008-12 (S.D.N.Y. 1979) (construing section 1985(3) to permit suits against federal officers, rejecting contrary decisions in the district); *Founding Church of Scientology v. Director, Federal Bureau of Investigation*, 459 F. Supp. 748 (D.D.C. 1978) (allowing section 1985(3) action against federal officer). As one Southern District of New York judge explained, in rejecting *Gregoire* and the cases that followed,

> Unless there is a rationale, unknown to the past cases, for holding that federal officers are not "persons" under § 1985(3), there is no longer any reason to exclude from coverage federal officers acting under color of federal law. Since such a rationale is inconceivable, *Griffin*'s holding that § 1985(3) applies to *any* person requires that it apply to federal officers.

Moriani v. Hunter, 462 F. Supp. 353, 356 (S.D.N.Y. 1978). We agree and hold that plaintiffs did not fail to state a claim upon which relief could be granted by naming either federal officers as defendants or, for reasons stated in section I(B), for naming as defendants the District of Columbia and its employees.

D. *Class-Based Discriminatory Animus*

FBI defendants also contend that plaintiffs failed to establish the existence of the "racial, or perhaps otherwise

class-based, invidiously discriminatory animus" [54] requisite to recovery under section 1985(3). Their challenge is not directed at the trial judge's instructions on the matter, which were not challenged below,[55] but at the sufficiency of the evidence on this element of plaintiffs' case. We hold that there was sufficient evidence to permit a jury to find that the FBI defendants acted with the requisite animus, and that the claim must therefore fail.

We note at the outset the existence of some debate over the kinds of class-based discriminatory animus that section 1985(3) requires. *Scott* sought to break down the potential scope of the provision into three categories of animus—economic and commercial, purely political (meaning wholly non-racial), and racial (including the traditional supporters of civil rights)—and held that the first category was not within the reach of the section. *Griffin*, on the other hand, had squarely placed the third category (*i.e.*, "racial") within the section's reach. Both cases left unanswered whether "political activity" *simpliciter* defines a class of people covered by section 1985(3). At the same time, several circuits have ruled that politics and religion define such a class. *See, e.g., Keating v. Carey*, 706 F.2d 377, 386-88 (2d Cir. 1983) (dis-

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[54] *Griffin*, 403 U.S. at 102.

[55] Nor do any defendants seriously contend that the Supreme Court's *Scott* decision, discussed *supra*, changed the law on this point. Justice White withheld judgment on the question whether § 1985(3) went beyond the core concern of racial animus, precisely as had the Court 12 years earlier in *Griffin*. *See Scott*, 103 S. Ct. at 3360 (citing *Griffin*, 403 U.S. at 102 n.9). We consequently do not read *Scott* to have wrought, on this issue, an intervening change in the law that would warrant application in this appeal. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981) (appellate court must apply the law in effect at time it renders decision, absent manifest injustice) (citing *Thorpe v. Housing Authority*, 393 U.S. 268, 281 (1969)).

crimination on basis of political affiliation constitutes class-based discriminatory animus); *Ward v. Connor*, 657 F.2d 45, 47-48 (4th Cir. 1981) (discrimination against members of Unification Church), *cert. denied*, 455 U.S. 907 (1982); *Hampton v. Hanrahan*, 600 F.2d 600, 623 & n.22 (7th Cir. 1979) (discrimination based on political affiliation with racial overtones), *modified on other grounds*, 446 U.S. 754 (1980); *Means v. Wilson*, 522 F.2d 833, 839-40 (8th Cir. 1975) (discrimination against supporters of insurgent candidate for tribal council presidency), *cert. denied*, 424 U.S. 958 (1976); *Glasson v. City of Louisville*, 518 F.2d 899, 911-12 (6th Cir.) (discrimination against critics of the President), *cert. denied*, 423 U.S. 930 (1975); *Marlowe v. Fisher Body*, 489 F.2d 1057, 1064-65 (6th Cir. 1973) (discrimination against Jews); *Action v. Gannon*, 450 F.2d 1227, 1232 (8th Cir. 1971) (en banc) (worshippers at predominantly White parish disrupted by Black civil rights workers); *see also* Comment, *Private Conspiracies to Violate Civil Rights*, 90 HARV. L. REV. 1721, 1728 (1977) ("[T]he legislative history behind section 1985(3) points unmistakably to the conclusion that discrimination [on the basis of political affiliations or beliefs] was intended to be actionable."); *cf. Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176 (10th Cir. 1983) (handicapped persons not a class within meaning of section 1985(3)), *cert. denied*, 52 U.S.L.W. 3687 (1984); *DeSantis v. Pacific Telephone and Telegraph Co.*, 608 F.2d 327, 333 (9th Cir. 1979) (homosexuals not a protected class).

Given the facts of this case, it is unnecessary to decide whether purely political or other activity without any racial overtones falls within section 1985(3). The FBI conspiracy allegedly targeted plaintiffs in significant part because of their involvement in and support of civil rights. *At a minimum*, according to *Griffin*, section 1985(3) reaches conspiracies motivated by animus against Blacks and those who support them. As the Court in *Scott* explained,

> The central theme of the bill's proponents was that the [Ku Klux] Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters. The latter included Republicans generally, as well as others, such as Northerners who came South with sympathetic views towards the Negro.[56]

Thus, in *Griffin*, the Court found an alleged conspiracy against Blacks (and against a non-party who was mistaken to be a civil rights worker), designed to prevent them from seeking equal rights under the laws, to satisfy the requisite animus requirement. Similarly, we find that the uncontroverted evidence plaintiffs offered to prove the requisite animus discloses that defendants' actions were undoubtedly aimed at plaintiffs at least in part on account of their *racial politics*—that is, their participation in and support of civil rights protest, so as to take the conspiracy out of the purely political, wholly non-racial category. The evidence strongly supports the conclusion that the COINTELPRO conspiracy was "impelled by a commingling of racial and political motives,"[57] and is far re-

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[56] *Scott*, 103 S. Ct. at 3359.

[57] *Hampton v. Hanrahan*, 600 F.2d 600, 623 (7th Cir. 1979), *modified on other grounds*, 446 U.S. 754 (1980). In *Hampton*, the Seventh Circuit held that the COINTELPRO-Black Nationalist program, as directed against the Black Panther Party, "a black organization with a distinct political ideology and a variety of politically-oriented programs," *id.* at 623, satisfied the requirements of a section 1985(3) claim. The court wrote that "[t]he conspiracy alleged in this case . . . does not require an intensive analysis into either the meaning of *Griffin* or Congress' intent in drafting section 1985(3) to determine whether the class-based animus requirement was satisfied," *id.*, and held that the section was drafted precisely to provide redress to victims of mixed political and racial conspiracies.

EDITOR'S NOTE

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moved from the kind of *purely* political disputes that seemingly have troubled the Supreme Court in its reading of section 1985(3).[58] The blatant racial overtone of the FBI program, coupled with plaintiffs' various organizational efforts, make clear the entanglement of race and politics that characterized the implementation of the COINTELPRO conspiracy.

First, the plaintiffs clearly constitute a class of Black and White civil rights workers and White supporters of their efforts and, thus, fall at the core of section 1985(3)'s concern. Plaintiffs Abbott and Booker were prominent in the Emergency Committee on the Transportation Crisis, a coalition of Black and White neighborhood groups opposed to construction of superhighways through the District's residential areas, because of the consequent displacement of many poor Blacks; plaintiffs Booker and Eaton were involved in organization of the Black United Front, a civil rights group. Plaintiff Hobson, an active member of the peace movement, also worked for and supported the civil rights efforts of her husband, Julius Hobson. Many of these plaintiffs also participated in protests against the Vietnam War, in part "to heighten the awareness of the public on particularly the racial miseries of the war . . . [meaning] that minority youths were disproportionately being drafted and fighting for the war."[59] At the same time, the plaintiffs who were primarily involved with antiwar groups, such as the Washington Mobilization Committee and the New Mobilization

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[58] As Justice White observed in *Scott*, 103 S. Ct. at 3359-60:

> [W]e find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or do other injury to a competing group by use of otherwise unlawful means. To accede to that view would go far toward making the federal courts, by virtue of § 1985(3), the monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume.

[59] II J.A. 633 (testimony of Tina Hobson).

Committee, worked with Black civil rights groups on peace marches [60] and otherwise, both to support civil rights generally and to increase Black awareness of the high casualty figures among Black soldiers and the perceived need, as a result, to participate in antiwar protest. Given the undisputed evidence that the antiwar plaintiffs and civil rights plaintiffs joined together to seek common goals of concern to each, we find they represent, at a minimum, a class of civil rights workers and their supporters at the core of section 1985(3)'s concerns.

It is equally clear that the FBI defendants' conspiracy was directed against plaintiffs because of their participation in these very activities. Considerable testimony described efforts by the FBI to drive a wedge into this alliance between civil rights groups and peace groups.

The FBI's COINTELPRO program sought not only to "neutralize" and "disrupt" Black groups and antiwar groups separately, but also to exploit any dissension between them in an effort to deter formation of an alliance. One of the most shocking examples of this effort is found in an FBI document, written in August 1969, relating to the BUF head tax demand on the New Mobilization Committee. It discloses that an aim of COINTELPRO-New

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[60] For example, plaintiff Bloom testified that the Washington Mobilization Committee, of which he was chairman, was formed to organize the April 15, 1967, Spring Mobilization, at which the Reverend Martin Luther King, Jr. joined with the peace groups for a demonstration in New York. II J.A. 662. Similarly, responding to a question on the New Mobilization Committee's position on having Black and White groups in the peace movement, he said, "[o]ne of the primary goals of the peace movement was to relate to and get involvement from the black community." II J.A. 667. *See also* II J.A. 859 (testimony of Arthur Waskow) ("I was working on questions of race relations both in the District of Columbia and in the country, generally."); II J.A. 917 (testimony of Sammie Abbott) (describing concern over number of Black casualties in the Vietnam War and his decision to organize Black citizens to work with peace groups.).

Left, to which it is referenced, was to split the antiwar and civil rights groups:

> The Washington Field Office has recommended and the Bureau concurs in that recommendation that this is an ideal situation to exploit through the Counterintelligence Program.
>
> Recipient offices are to furnish recommendations for such action to the Bureau by 8/29/69 without fail. Consideration is to be given to utilizing informants in both racial and nonracial protest groups in this matter. It is noted that the nonracial protest groups, particularly the NMC, can be accused of racism in refusing to go along with this demand. At the same time, such groups could be split further by some individuals calling the Front's demands extortion while other individuals in the group support the demands.
>
> . . . .
>
> The NMC has called for a massive demonstration at Washington, D.C., on 11/15/69. This demonstration may result in confrontation with authorities. The BUF is demanding that it be paid to let this demonstration go on in Washington, D.C. Committee members are upset over these demands and this situation offers an opportunity to divide and to embarrass them. This airtel requests recommendations from the field.[61]

An October 1969 memorandum from the Special Agent in Charge (SAC) in New York to the FBI Director, also referenced to COINTELPRO-New Left, followed:

> Enclosed are two copies of a suggested leaflet entitled "Give Them Bananas!", designed to widen the rift between the New Mobilization Committee To

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[61] Plaintiffs' Ex. 18, IV J.A. 1828, 1829 (airtel from Director, FBI to Special Agent in Charge, Chicago, Cleveland, Detroit, Los Angeles, New York, Philadelphia, San Francisco, WFO, dated Aug. 21, 1969).

> End The War In Vietnam (NMC) and the Black United Front (BUF) over the BUF demand that the NMC "pay" for their planned March on Washington 11/15/69.
>
> Enclosed leaflet has been written in the jargon of the New Left, necessitating the use of a certain amount of profanity.
>
> It is realized this material is racial in tone but it is believed this is the one point of vulnerability in the NMC-BUF combination.
>
> Bureau authority is requested to prepare and mail anonymously the enclosed leaflet to selected individuals active in the NMC and BUF both in the New York and Washington areas.[62]

Subsequent documents reveal that Bureau authority was granted, with the caution, "Take all necessary steps to protect the identity of the Bureau as the source of these leaflets," [63] and that copies of the leaflet were forwarded to WFO for distribution.[64] Rev. Moore, purported author of the BUF head tax demand, testified that he in fact received the FBI's leaflet.[65] As distributed, it was titled, "Give Them Bananas!", was "decorated" with a drawing of a monkey, and contained a string of profane, racist and degrading remarks that our senses of propriety and revulsion prevent us from reprinting in full.[66]

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[62] Plaintiffs' Ex. 23, IV J.A. 1846 (memorandum from SAC, New York to Director, FBI, Subject: COINTELPRO-New Left, dated Oct. 10, 1969).

[63] Plaintiffs' Ex. 24, IV J.A. 1848 (message to SAC, New York from Director, FBI, Subject: COINTELPRO-New Left, dated Oct. 15, 1969).

[64] Plaintiffs' Ex. 25, IV J.A. 1849 (message from SAC, New York to SAC, WFO).

[65] *See* III J.A. 1601-02 (testimony of Douglas Moore).

[66] For a partial—and relatively benign—excerpt, see Background section II, *supra*.

We believe the foregoing amply discloses that the FBI actions were sufficiently related to matters of race to place the FBI conspiracy solidly within even the narrowest reading of section 1985(3).[67] Section 1985(3) was "intended, perhaps more than anything else, to provide redress for victims of conspiracies impelled by a commingling of racial and political motives." [68] We would be hard pressed to imagine a case with evidence stronger than we find here of precisely such commingled motives. Accordingly, we reject the FBI defendants' contention that plaintiffs' evidence on this element of their claim did not support the verdict.

II. Harlow v. Fitzgerald *and Defendants' Qualified Immunity*

After trial and entry of judgment in this case, the Supreme Court issued its opinion in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which altered the law of qualified immunity.[69] All defendants claim that the rule announced in *Harlow* applies to this case and requires judgment in their favor. While we agree that the principle announced in *Harlow* controls this case, we find that it does not require entry of judgment in favor of defendants.

A. *Qualified Immunity and the* Harlow *Standard*

Prior to *Harlow*, qualified immunity had both subjective and objective elements. The objective element in-

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[67] The District defendants do not raise this issue.

[68] *Hampton*, 600 F.2d at 623.

[69] At the time, defendants Brennan, Moore, Jones, Pangburn and Grimaldi moved to set aside the verdicts against them on the ground that the acts for which they were found liable in damages did not violate clearly established statutory or constitutional rights. *See* Second Motion by Defendants Brennan, Moore, Jones, Pangburn and Grimaldi for Judgment Notwithstanding the Verdict, Or, In the Alternative, for New Trial, filed Aug. 2, 1982. The District Court denied this motion. *Hobson v. Wilson*, No. 76-1326 (D.D.C. Aug. 28, 1982).

volved a presumptive knowledge of and respect for "basic, unquestioned constitutional rights." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The subjective element addressed the "permissible intentions," *id.*, or good faith of the Government actor. In other words, an official would not receive qualified immunity if he

> knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] or if [the official] took the action with the malicious intention to cause a deprivation of constitutional rights or other injury

Wood, 420 U.S. at 322.

The Supreme Court's decision to grant state [70] and federal [71] officers qualified, instead of absolute immunity "reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens . . . but also 'the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.'" *Harlow*, 457 U.S. at 807 (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). By striking the balance in this manner, the Court determined that the need for damage remedies required rejection of an absolute immunity for federal officers. Yet, the fears remained that Government officials might be chary in the exercise of their most important public functions if constantly subject to discovery and trial over their discretionary decisions. To shield Government officers from *undue* interference, the Court admonished lower courts applying the qualified immunity standard to engage in

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[70] *See Scheuer v. Rhodes*, 416 U.S. 232 (1974).

[71] *See Butz v. Economou*, 438 U.S. 478, 504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

"firm application of the Federal Rules of Civil Procedure [to] ensure that federal officials are not harassed by frivolous lawsuits," [72] and endorsed the idea of resolving the immunity issue of damage suits at the summary judgment stage.[73]

Experience with the qualified immunity defense proved it to be often ineffective in resolving suits on summary judgment. If any factual dispute existed as to whether the official acted with malicious intent, or with a belief that a clear standard prohibited his conduct, that dispute required a subjective determination necessitating a trial. "The need for such determinations thus frustrated the goal of terminating insubstantial lawsuits on summary judgment." *National Black Police Association, Inc. v. Velde*, 712 F.2d 569, 574 (D.C. Cir. 1983), *cert denied*, 52 U.S.L.W. 3791 (1984).

Harlow redefined the qualified immunity defense to eliminate the subjective element. Under the new standard, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The Court further explained,

> If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Id. at 818-19. In other words, if the trial judge determines that the law was not clearly established at the

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[72] *Butz*, 438 U.S. at 508.

[73] *Id.*

time the conduct occurred, the inquiry ceases and the official is entitled to summary judgment. If the law was clearly established, the Government actor is presumed to have known about it; unless he can bring forward undisputed facts establishing that because of extraordinary circumstances he neither knew nor should have known of the unlawfulness, summary judgment in his favor must be denied.

B. *Application of the* Harlow *Standard*

In applying the foregoing principles to this case, we conclude that the acts defendants were alleged to have committed violated fundamental and well-established constitutional rights, and that defendants are entitled neither to immunity nor, consequently, to reversal of the verdicts against them on this ground.

Our task, in applying *Harlow*, is to measure the constitutionality of the acts alleged in this action by reference to clearly established rights at the time the acts occurred. At first blush, the task as so stated appears simple and straightforward. A moment of reflection, however, reveals various uncertainties in the *Harlow* decision and exposes a test of some imprecision. It is not clear, for example, how a court should determine well-established rights: should our reference point be the opinions of the Supreme Court, the Courts of Appeals, District Courts, the state courts, or all of the foregoing? [74] Furthermore, it is unclear whether we must assure ourselves only of the existence of a constitutional right, such as the constitutional right of freedom of speech, or religion, at the relevant time. Alternatively, it might be claimed that a court must inquire more deeply into the constitutionality of the particular conduct of the Government actor, such as the legality of domestic national security warrantless

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[74] *See Zweibon v. Mitchell*, 720 F.2d 162, 169 (D.C. Cir. 1983) (declining to define what constitutes well-established law because the illegality of the conduct at issue "was not 'clearly established' by any reasonable definition of the phrase").

wiretaps,[75] at a given time. Put another way, how broadly or narrowly defined is the right that must be well-established?

At the extremes, the answers are clear. Supreme Court precedent "establishes" the law; to the extent that the Court's opinions give guidance we obviously do not doubt that the law is well-established. It is equally clear that the right at issue can be defined neither so broadly as to parrot the language in the Bill of Rights, nor so narrowly as to require that there be *no* distinguishing facts between the instant case and existing precedent. The former reading of *Harlow* would, of course, undermine the premise of qualified immunity that the Government actors reasonably should know that *their* conduct is problematic. The latter reading, on the other hand, would unquestionably turn qualified into absolute immunity by requiring immunity in any new fact situation. In future cases, courts will of course work through the area between these extremes and answer these and other questions. On the facts of this case, however, these broad parameters suffice, because the illegality of the conduct alleged was well-established "by any reasonable definition of the phrase." [76]

In an effort to overcome the obvious, defendants focus on the trial evidence and argue that each individual act that they were shown to have committed was lawful, and that they consequently are immune. This argument seriously misconstrues the nature of the qualified immunity defense, and in particular the separate questions of fact and law. We pause here to address the proper course of pleadings and proof on this issue, to make clear why we find defendants' argument irrelevant to this element of our review.

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[75] *See id.* (holding no clearly established warrant requirement for domestic national security wiretaps existed at relevant time).

[76] *Id.* at 169.

The difficulty, we presume, stems from the bipartite nature of *Harlow*'s inquiry. First, a district court must determine whether the right alleged to have been violated was well-established; it then must determine whether the defendant reasonably should have known of its existence. While *Harlow* asserted that a "reasonably competent public official should know the law governing his conduct," 457 U.S. at 819, in some extraordinary instances "what a reasonable person in like circumstances should have known" [77] has been held to create a question of fact. Step-by-step, the inquiry proceeds as follows: assume plaintiff alleges that defendant violated Right X, and defendant moves for summary judgment on grounds of qualified immunity, claiming Right X was not well-established when the alleged acts were committed and, alternatively, that extraordinary circumstances prevented him both from knowing and having reason to know the relevant legal standard. If the district court judge determines as a matter of law that Right X was well-established, a question of fact might still remain as to whether defendant reasonably neither knew nor should have known of it. The first issue is purely legal and should be susceptible to initial determination on the complaint and summary judgment papers. The latter is potentially an issue for trial, depending upon the unique circumstances of each case.[78]

Applying these principles, we must consider in this action only whether the right that plaintiffs alleged to have been violated was well-established at the time the alleged acts occurred. We consider irrelevant to this inquiry defendants' assertions that the evidence does not support

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[77] *McSurely v. McClellan*, 697 F.2d 309, 321 n.20 (D.C. Cir. 1982).

[78] Thus in *McSurely* this court affirmed, on direct review, the trial court's denial of defendant's motion for summary judgment on immunity grounds but made clear that questions of fact might ultimately result in a finding of immunity. *See McSurely*, 697 F.2d at 325 n.24.

those allegations; such evidence is properly considered as an element of our inquiry into the sufficiency of the evidence, not qualified immunity. Because no defendant argues that exceptional circumstances exist to demonstrate that he reasonably neither knew nor should have known of the relevant legal standard, our inquiry is finished following our determination whether the applicable law was well-established.[79]

Plaintiffs alleged in their complaint[80] that from 1967 or 1968 to 1974 the District and FBI defendants engaged in a variety of legal and illegal activities in a specific effort "to disrupt and interfere with the plaintiffs' political activities, [,including] urging violent or unlawful actions, and supplying the public and/or news media with false information about the plaintiffs and their plans."[81] Plaintiffs also alleged that "[s]ome or all of the activities of defendants"[82] were conducted pursuant to a plan, known as COINTELPRO-New Left, which, they contended, was "designed to conduct surveillance upon and to cause disruption of the activities of what the defendants regarded as the 'New Left.'"[83] Plaintiffs claimed that because these actions were undertaken expressly to disrupt their lawful activities, they

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[79] Defendants do not argue that extraordinary circumstances prevented them from knowing that the actions they were alleged to have taken were illegal. They claim instead only that no individual act was illegal, thereby overlooking plaintiffs' focus on the motives with which the defendants acted. Whether defendants acted with an intent to impede plaintiffs' rights of association was a question of fact for the jury, and the jury answered in the affirmative. While we disagree with some aspects of the jury's verdict, *see* Discussion section VI, *infra*, our consideration of the evidence is unrelated to qualified immunity.

[80] I J.A. 76.

[81] *Id.* at 84.

[82] *Id.* at 85.

[83] *Id.*

violated, *inter alia*, plaintiffs' First and Fifth Amendment rights.[84]

The extraordinary nature of these charges makes this an easy case. Whatever authority the Government may have to interfere with a group engaged in unlawful activity, and however it may be permitted to impede or deter rights of lawful association as a by-product of legitimate Government actions, it is *never* permissible to impede or deter lawful civil rights/political organization, expression or protest with no other direct purpose and no other immediate objective than to counter the influence of the target associations.

As of 1967, the existence of a First Amendment right of association for lawful purposes was beyond dispute and its broad contours were quite clear.[85] A line of Su-

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[84] This case went to the jury only on the First and Fifth Amendment claims, the District Court having dismissed plaintiffs' other constitutional claims. Accordingly, we review only that aspect of the complaint that resulted in a verdict against defendants.

[85] The rights of peaceable assembly and petition "have deep roots in the American experience," Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74, 80. Historically the right to assemble peaceably was regarded as a by-product of the right of petition, *id.* at 80 (citing *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)), but long before the 1960s it had come to be well known as

> a right cognate to those of free speech and free press [that] is equally fundamental. . . . [T]he right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions. . . . The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for political discussion, to the end that government may be responsive to the will of the people and that changes,

preme Court cases had expressly established first, that Government cannot constitutionally punish membership in or association with any organization, absent clear

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if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937). In *De Jonge*, the Supreme Court not only established the right to assemble but also identified it as one that adheres to the individual who wishes to assemble. In that 1937 opinion the Court found unconstitutional as applied a state statute that had the effect of punishing participation in a meeting for lawful discussion of public issues because it was held under the auspices of the Communist Party. The Court concluded that "[t]he holding of meetings for peaceable political action cannot be proscribed. . . . Notwithstanding [the objectives of the Communist Party], the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party. The defendant was none the less entitled to discuss the public issues of the day and thus in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. That was of the essence of his guaranteed personal liberty." *Id.* at 365-66.

From this basic right to assemble peaceably, along with the companion rights of free speech and press, the Court in the 1950s developed the broader concept of freedom of association. Thus, in its 1957 decision in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court held unconstitutional a state court order requiring the NAACP to provide its membership lists, and emphasized the likelihood of reprisals against the persons whose names were disclosed. Addressing the constitutional right at stake, Justice Harlan wrote,

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of

proof that a person specifically intends to accomplish the illegal aims of the organization, *see Scales v. United States*, 367 U.S. 203, 228-30 (1961); *Noto v. United States*, 367 U.S. 290, 299-30 (1961); second, that Government cannot constitutionally punish individual or group advocacy of any position, unless it amounts to incitement to lawless action, *see Bond v. Floyd*, 385 U.S. 116 (1966); *Yates v. United States*, 354 U.S. 298 (1957); and third, that lawful associations and their members have the right to be protected from facially legitimate Government actions that would deter membership or otherwise thwart their efforts to associate and petition the Government for redress of their grievances. The first two principles at a minimum rendered absolutely unconstitutional *any* direct Government interference with persons *because* they participated in organizations, if those organizations did not advocate violence or other lawless action, or *because* they held certain views, if those views were not accompanied by incitement to illegal action or a specific intent to accomplish illegal ends by force and violence. The third principle was not absolute, but made unconstitutional Government action taken for legitimate purposes if it significantly interfered with protected rights of association, unless the Government could demonstrate a substantial, *NAACP v. Button*, 371 U.S. 415, 444 (1963), or compelling, *Bates v. Little Rock*, 361 U.S. 516, 524 (1960), interest to justify the infringement, and that the interest could not more narrowly be accommodated. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960)

> speech. . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61. He continued, "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462.

("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

These principles leave no doubt that Government action, taken with the intent to disrupt or destroy lawful organizations, or to deter membership in those groups, is absolutely unconstitutional. The Government could not constitutionally make such participation unlawful; consequently, it may not surreptitiously undertake to do what it cannot do publicly. Nor can we fathom any conceivably legitimate governmental interest in such an undertaking. If the targets act unlawfully, criminal laws are available. Nor do we accept any argument that proper law enforcement requires systematic disruption and neutralization of lawful organizations.

It is therefore absolutely clear that the actions defendants were alleged to have taken violated well-established rights. The defendants allegedly directed and participated in a program designed to obstruct plaintiffs' efforts to work peaceably for political change and civil rights, and to splinter and neutralize plaintiffs' organizations. The constitutional right of association of the kind in which plaintiffs were engaged was well known, as was the degree of protection from direct interference that such lawful association was to be accorded. Additionally, while the associational right was not absolute, permissible limits of Government intrusion in various contexts were sufficiently defined. In a case such as this one, in which the pleadings and proof disclose a program that at its tamest violated the narrowly defined associational rights expressly discussed in these cases, and which in fact extended beyond violations previously contemplated, the law was undoubtedly "well-established." In such circumstances, to require a prior Supreme Court holding on the particular facts of this case would not only immunize but

actually reward the Government for inventing and pursuing ever more egregious conduct. Indeed, there never could be such a ruling from the Court, because *Harlow* would always immunize the Government actors. Simply put, where it is apparent that less direct, and facially legitimate intrusions on plaintiffs' rights violate the Constitution, it is beyond question that sweeping, intentional intrusions do so as well.

C. *Pleading Unconstitutional Motive*

Harlow focused on the need to enable courts to dismiss "insubstantial" lawsuits before discovery and trial, and it adjusted the qualified immunity defense to facilitate that goal. The kind of case we confront today, involving allegations of unconstitutional motive, offers to litigants a possible means to circumvent the new rule, simply by pleading that any act was performed with an intent to violate clearly established constitutional rights and thereby surmounting the threshold test set out in *Harlow*. We recognize that in some instances, plaintiffs might allege facts demonstrating that defendants have acted lawfully, append a claim that they did so with an unconstitutional motive, and as a consequence usher defendants into discovery, and perhaps trial, with no hope of success on the merits. The result would be precisely the burden *Harlow* sought to prevent. Accordingly, in cases involving a claim that defendants acted with an unconstitutional motive, we will require that nonconclusory allegations of evidence of such intent must be present in a complaint for litigants to proceed to discovery on the claim. The allegations on this issue need not be extensive, but they will have to be sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds.

As a general proposition, the problem we address is not a new one. In *Butz v. Economou* the Supreme Court ap-

parently recognized that general conclusory allegations that Government actors had breached constitutional rights could unduly enmesh them in burdensome litigation, and it called for a firm application of the Federal Rules of Civil Procedure and for dismissal of insubstantial claims on summary judgment.[36] Similarly, every other circuit has articulated a requirement of particularity in pleading for civil rights complaints. In one formulation, the Second Circuit adheres to the following rule:

> [C]omplaints containing only "conclusory," "vague," or "general allegations" of a conspiracy to deprive a person of constitutional rights will be dismissed. . . . Diffuse and expansive allegations are insufficient. . . . In this case, appellants' unsupported allegations, which fail to specify in detail the factual basis necessary to enable appellees intelligently to prepare their defense, will not suffice to sustain a claim of governmental conspiracy to deprive appellants of their constitutional rights.

Ostrer v. Aronwald, 567 F.2d 551, 553 (2d Cir. 1977) (citations omitted); *see also Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 106-07 (2d Cir. 1981) ("Where a plaintiff fails to produce any specific facts whatsoever to support a conspiracy allegation, a district court may, in its discretion, refuse to permit discovery and grant summary judgment. . . . Courts must be particularly cautious to protect public officials from protracted litigation involving specious claims."). Moreover, every other circuit follows suit in requiring that civil rights complaints be pleaded with at least a

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[36] *See Butz*, 438 U.S. at 508. In his partial dissent in *Butz*, Justice Rehnquist argued that the immunity defense established there "amounts to saying that an official has immunity until someone alleges he has acted unconstitutionally. But that is no immunity at all. . . ." 438 U.S. at 520 (Rehnquist, J., concurring in part and dissenting in part). The majority's reference to a firm application of the civil procedure rules no doubt was in part intended as a response to this concern.

minimum of specificity.[87] Nor is the principle unknown in this Circuit. *See Lombard v. United States*, 690 F.2d 215, 227 (D.C. Cir. 1982) (applying the Second Circuit's *Ostrer* rule to claims under the Federal Tort Claims Act), *cert. denied*, 103 S. Ct. 3086 (1983).

The test articulated by the Second Circuit is more than adequate to address the *Harlow* concerns to which we have referred. We simply remind our trial courts that some factual allegations must support claims of unconstitutional motive. Plaintiffs who fail to allege any

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[87] *See Hurney v. Carver*, 602 F.2d 993, 995 (1st Cir. 1979) (courts need not "conjure up" unpled facts to support conclusory allegations); *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979) (civil rights complaint must do more than state simple conclusions); *Hall v. Pennsylvania State Police*, 570 F.2d 86, 89 (3d Cir. 1978) (complaint must be sufficiently precise to give notice of claims asserted); *Smith v. International Longshoremen's Ass'n*, 592 F.2d 225, 226 (4th Cir. 1979) (Federal Rules of Civil Procedure, Rules 8(a) and (e), require definiteness in complaint); *Wetherington v. Phillips*, 526 F.2d 591 (4th Cir. 1975), *aff'g mem.*, 380 F. Supp. 426, 428 (E.D.N.C. 1974) (failure to allege facts showing constitutional deprivation leads to dismissal); *Jewell v. Covington, Ga.*, 425 F.2d 459, 460 (5th Cir.) (general conclusory allegations unsupported by any facts do not constitute cause of action), *cert. denied*, 400 U.S. 929 (1970); *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971) (pleading is not sufficient to state cause of action under Civil Rights Act "if its allegations are but conclusions"); *Cohen v. Illinois Inst. of Technology*, 581 F.2d 658, 663 (7th Cir. 1978) (some particularized facts demonstrating a constitutional deprivation are needed to sustain cause of action under Civil Rights Act), *cert. denied*, 439 U.S. 1135 (1979); *Nickens v. White*, 536 F.2d 802, 803 (8th Cir. 1976) (civil rights pleadings must not be conclusory); *Uston v. Airport Casino, Inc.*, 564 F.2d 1216, 1217 (9th Cir. 1977) (complaint must contain specific factual allegations to support claim of conspiracy); *Coopersmith v. Supreme Court*, 465 F.2d 993, 994 (10th Cir. 1972) (under federal rules, complaint must state factual basis for claim asserted).

specific facts to support a claim of unconstitutional motive cannot expect to involve Government actors in protracted discovery and trial. On receipt of such a complaint, Government defendants might move for dismissal or, alternatively, for summary judgment. Then plaintiffs must produce some factual support for their claim to avert dismissal.

In so holding we do not forget that in some circumstances plaintiffs are able to paint only with a very broad and speculative brush at the pre-discovery stage, and that overly rigid application of the rule we articulate could lead to dismissal of meritorious claims.[88] Thus, while we hasten to add that district court judges must act cautiously in this regard, and freely give leave to amend an inadequate complaint, we conclude that *Harlow* requires that merely conclusory allegations of unconstitutional motive, devoid of factual support, must be found lacking and be dismissed.

Applying these principles, we find plaintiffs' complaint [89] was drafted with sufficient specificity to withstand dismissal in this case. Plaintiffs not only alleged specific kinds of disruptive activity that could have had no other purpose than to disrupt, but also alleged facts describing the COINTELPRO program designed to conduct surveillance and cause disruption of plaintiffs' activities. These allegations clearly were neither general, conclusory, nor devoid of factual support and would have sufficed to survive a motion for dismissal under the standards we articulate today.

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[88] *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1230 (1969 & 1984 Supp.) ("The court should remember that fundamental rights and important questions of public policy are involved in actions under the various civil rights statutes and should not dismiss the complaint unless it clearly is frivolous or fails to state a claim for relief.").

[89] *See* I J.A. 76.

D. *Municipal Liability*

The District of Columbia argues that it is entitled to a new trial because the jury was instructed incorrectly on municipal liability. It asserts that the District Court's *proposed* instruction was correct, but that the instruction *actually given* was erroneous.[90] Whatever objection might have been raised, we find that the District did not raise this argument after the instruction was given and, consequently, it has waived any right to pursue this matter on appeal.

Rule 51 of the Federal Rules of Civil Procedure states with unmistakable clarity that "[n]o party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Case law in this Circuit[91] and elsewhere[92] leaves no doubt that parties who have an opportunity to object to instructions before the jury retires and do not avail themselves of it cannot claim on appeal that the instructions were erroneous. Yet, that is precisely what the District of Columbia seeks to do.

Indeed, this case attests to the wisdom of the rule. The purpose of Rule 51 is to give the trial judge an opportunity to correct any inadvertent omission, ambiguity or error, reconsider any ruling, or make any other necessary changes or clarifications *before* the jury retires, and

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[90] Brief of District of Columbia Appellants, pp. 68-69.

[91] *See Hopkins v. Baker*, 553 F.2d 1339, 1343 (D.C. Cir. 1977); *Imperial Ins., Inc. v. Employers' Liab. Assurance Corp.*, 442 F.2d 1197, 1201 (D.C. Cir. 1970).

[92] *See, e.g., Holloway v. J.B. Systems, Ltd.*, 609 F.2d 1069, 1073 (3d Cir. 1979); *Cockrell v. Ferrier*, 375 F.2d 889, 891 (5th Cir. 1967).

in that way avoid the delay and expense of a retrial.[93] The rule obliges counsel to follow the charge to the jury, and to point out alleged errors in the instructions as given. Thus, "[t]he necessity of a retrial is avoided when, by design or through sheer neglect, the losing party fails to make objection at the proper time." [94]

Here, the District argues that Judge Oberdorfer mistakenly deviated from his own proposed instruction, making this precisely the kind of case to which Rule 51 is addressed. Had the District simply read along as the instructions were given and called the alleged deviation to the Judge's attention, we presume that the judge would have corrected any error. It appears that plaintiffs' counsel followed that course with respect to other matters and received at least one clarifying instruction on another separate issue.[95] Meanwhile, when given the opportunity, the District counsel raised no independent objections and requested no clarifications. Under such circumstances, we decline at this late date to entertain the District's claim.[96]

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[93] *See Rogers v. Northern Rio Arriba Elec. Coop., Inc.*, 580 F.2d 1039, 1042 (10th Cir. 1978); *see also Maheu v. Hughes Tool Co.*, 569 F.2d 459, 470 (9th Cir. 1977).

[94] 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2551, at 623 (1971).

[95] *See* III J.A. 1686-1693.

[96] Moreover, even assuming, *arguendo*, that the plain error rule applies in this context, *see Dellums v. Powell*, 566 F.2d 167, 190-91 & n.63 (D.C. Cir. 1977) (declining to decide whether "plain error" rule applies to Rule 51); *compare Moore v. Telfon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978) ("plain error" rule may not be invoked in civil action to obtain review of instructions, given or refused, where objection was not raised in trial court) *with Brenner v. World Boxing Council*, 675 F.2d 445, 456 (2d Cir.) ("plain error" doctrine applies in civil cases but only in exceptional circumstances), *cert. denied*, 103 S. Ct. 79 (1982), and *Beardshall v. Minuteman Press Int'l, Inc.*, 664 F.2d 23 (3d Cir. 1981)

III. *Statute of Limitations*

All defendants argue that the District Court erred in denying their motions for directed verdicts on statute of limitations grounds. Having reviewed the applicable legal standard and the relevant evidence, we conclude that the District Court should have granted the motions of the FBI defendants as to plaintiffs Abbott, Bloom and Booker. The remaining motions—as to all plaintiffs by the District defendants, and as to the other plaintiffs by the FBI defendants—were properly denied.[97]

When no federal statute of limitations governs the period of repose for actions brought under the Civil Rights Act, or under the rationale of *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), a federal court must look to the limitations period applicable to the most nearly analogous state cause of action.[98] On that

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(same), the alleged error here surely does not reach the exacting standard that application of the plain error doctrine requires. *See Dellums*, 566 F.2d at 191 n.63 (*if* rule applies, plain error should be recognized in a civil action only in the same rare cases in which it is recognized in criminal actions pursuant to Rule 52 of the Federal Rules of Criminal Procedure); *Brenner*, 675 F.2d at 456 (apply doctrine only when error is "so serious and flagrant that it goes to the very integrity of the trial"); *Beardshall*, 664 F.2d at 27 (proper to apply doctrine only if failure to consider error "would result in a miscarriage of justice") (quoting *United States v. 564.54 Acres of Land*, 576 F.2d 983, 987 (3d Cir. 1978) (footnote omitted), *rev'd on other grounds*, 441 U.S. 506 (1979)).

[97] Defendants also variously challenge the District Court's failure to give a proffered instruction, Brief of FBI Appellants, p. 67, the instructions the court gave on concealment and due diligence, Brief of FBI Appellants, p. 67, Brief of District Appellants, pp. 34-35, and the statute of limitations the District Court applied. Brief of Appellant Jones, p. 13. For reasons set out, *infra*, we reject these arguments.

[98] *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

basis, it is clear that the three-year limitations period provided in D.C. CODE ANN. § 12-301(8) (1981) controls this case.[99]

Plaintiffs' complaint, filed July 16, 1976, seeks damages for actions occurring from 1967 or 1968 to 1974. In other words, this suit was initiated *after* the applicable three-year limitations period. Plaintiffs argue, however, that in this case the defendants' fraudulent concealment tolled the statute of limitations. It is to this aged doctrine of fraudulent concealment that we now turn our attention.

A. *Fraudulent Concealment: Case Law*

Initially, all defendants agree that federal law provides the applicable tolling doctrine. This assumption is consistent with the law in this Circuit[100] and, since we reach

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[99] Section 301 provides a three-year limitations period for claims ". . . for which a limitation is not otherwise specially prescribed." D.C. CODE ANN. § 12-301(4) (1981) provides a one-year limitations period "for libel, slander, assault, battery, mayhem, wounding, malicious prosecution, false arrest or false imprisonment," and is inapposite. *McClam v. Barry*, 697 F.2d 366 (D.C. Cir. 1983), is not to the contrary. *McClam* adopted the one-year limitations period because the constitutional claim was for an assault, which is specifically identified in D.C. CODE ANN. § 12-301(4). Indeed, *McClam* specifically distinguished an earlier *Bivens* action based on the First Amendment, which had adopted the three-year period. *Id.* at 372. We reject, as based on a misreading of *McClam*, any argument that *McClam* decided that all *Bivens* actions are controlled by the one-year limitations period.

[100] *See Richards v. Mileski*, 662 F.2d 65, 68 (D.C. Cir. 1981) (tolling policy in *Bivens* action is federal question); *Smith v. Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (applying federal tolling doctrine to *Bivens* claim), *cert. denied*, 453 U.S. 912 (1981). Of course, these cases merely decided that federal tolling policies apply to *Bivens* actions, not to § 1985(3) actions. Moreover, these cases did not cite either *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) or *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), in which

the same result under local law as well,[101] we take it to be true for purposes of this discussion.

The keystone of federal fraudulent concealment doctrine is *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874), in which the Court wrote that where a party injured by another's fraudulent conduct

> remains in ignorance . . . without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Id. at 348. The Court also held that, absent laches or negligence on plaintiff's part, the limitations period does not begin to run until plaintiff discovers his cause of action when "the fraud has been concealed *or is of such character as to conceal itself.*" *Id.* at 349-50 (emphasis added). Shortly thereafter, in *Wood v. Carpenter*, 101 U.S. 135 (1879), the Court gave some indication of the meaning of the phrase "of such character as to conceal itself," when it wrote, "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Id.* at 143. Read together, *Wood* and *Bailey* establish first, that equitable tolling generally has two elements, (successful) concealment by defendant and diligence by plaintiff, and

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the Supreme Court had directed federal courts to apply state, not federal, tolling policies, under certain circumstances, in civil rights actions. *But see Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (in action to enforce federally created equitable right, federal fraudulent concealment doctrine, not state statute of limitations, controls). Thus, we tentatively accept the parties' wholesale reliance on federal law but, recognizing that the law is in considerable flux on this point, rest our holding on alternative grounds of federal and state tolling doctrines. *See* note 113, *infra* (discussing District of Columbia law).

[101] *See* note 100, *supra*; note 113, *infra*.

second, that a defendant who contrives to commit a wrong in such a manner as to conceal the very existence of a cause of action, and who misleads plaintiff in the course of committing the wrong, may be found to have concealed the wrong. This second principle distinguishes between acts that are self-concealing (such as frauds) and acts where, absent a subsequent act of concealment, only the perpetrator, but not the fact that a cause of action might exist, would be unknown (such as a burglary). In the former case, concealment is established by the nature of the act; in the latter case, additional acts of concealment are required to trigger the tolling doctrine.[102]

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[102] *See Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 341 n.2 (5th Cir. 1971) (distinguishing cases where "the concealment is inherent in the fraud" from cases in which plaintiff must show successful concealment *and* fraudulent means to achieve concealment). On the early development of these two lines of analysis as separate doctrines, *see* Dawson, *Undiscovered Fraud and Statutes of Limitation*, 31 MICH. L. REV. 591 (1933); Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 MICH. L. REV. 875 (1933).

The difference in the two categories, as we see it, is whether the deception, misrepresentation, trick or contrivance is a necessary step in carrying out the illegal act, or whether it is separate from the illegal act and intended only to cover up the act. For example, if a thief steals an antique vase and replaces it with a fake rendition, the act of replacement—whether it occurs immediately after the original vase is removed or hours or days thereafter—is a separate act of concealment. This is because once the original is taken, the illegal act is done. An example of the other category would be a scheme in which deception or misrepresentation affected the behavior of another, where that change in behavior enabled the would-be defendant to carry out his scheme—as where a person knowingly sells a fake vase as a real antique. In that instance, the statute would toll until the buyer discovered or should have discovered the deception. We recognize that the line between the categories is not always a bright one but believe this basic outline suffices for our purposes.

Although the foregoing principles generally have been accepted by the courts, the case law reflects a variety of formulations to apply the concealment doctrine.[103] In each

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[103] The circuits vary in their approach to cases involving *wrongs that are not self-concealing, compare Tomera v. Galt*, 511 F.2d 504, 510 (7th Cir. 1975) (requiring only a subsequent positive act of concealment, and no due diligence showing, to toll the statute) *and Robertson v. Seidman & Seidman*, 609 F.2d 583, 593 (2d Cir. 1979) (same) *with Campbell v. Upjohn Co.*, 676 F.2d 1122, 1128 (6th Cir. 1982) (rejecting Seventh Circuit view that due diligence is not required when active concealment is shown). However, the courts generally are in accord in their treatment of *self-concealing wrongs*:

> At least two types of fraudulent behavior toll a statutory period. Bailey v Glover, 21 Wall. 342, 22 L.Ed 636 (1875). *In the first type, the most common, the fraud goes undiscovered even though the defendant after commission of the wrong does nothing to conceal it and the plaintiff has diligently inquired into its circumstances. The plaintiffs' due diligence is essential here.* . . . In the second type, the fraud goes undiscovered because the defendant has taken positive steps after commission of the fraud to keep it concealed.

Tomera v. Galt, 511 F.2d at 510 (emphasis added). Following the decision in *Tomera*, another panel of the Seventh Circuit added, "Should active concealment be found, then the statute is tolled until actual discovery. . . . If no active concealment is present, then the issue becomes whether knowledge of the alleged fraud could reasonably have been acquired before [the date plaintiffs claim the statute began to run], with the exercise of due care. . . . *These are issues of fact.*" *Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975) (emphasis added). The First, Second, Eighth and Tenth Circuits have endorsed this view, as has this Circuit. *See Wachovia Bank & Trust Co. v. National Student Marketing Corp.*, 650 F.2d 342, 349 (D.C. Cir. 1980) (equitable tolling doctrine "permits, with respect to fraud, the tolling of the limitations period until the plaintiff discovers, or should have discovered through the exercise of due diligence, the fraudulent activity"), *cert. denied*, 452 U.S. 954 (1981); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1155 (10th Cir. 1981) (simultaneous activity to conceal a wrong, in course of on-

instance, however, before a defendant's "exposure to liability is given a potentially infinite duration, there [is] some minimum of culpability—if not affirmative concealment, then at least the construction of a scheme which is by its nature unknowable." [104]

Applying these principles to the facts of this case, we are able to put to one side actions involving wrongs that are by their nature "knowable" and taper our analysis to focus on the "self-concealing" wrongs that warrant different treatment. Bearing in mind *Wood*'s requirement of "some trick or contrivance intended to exclude suspicion," 101 U.S. at 143, we conclude that defendants must engage in some misleading, deceptive or otherwise contrived action or scheme, *in the course of committing the wrong*, that is designed to mask the existence of a cause of action.[105] The deception may be as simple as a single lie or as complex as that which we confront here, so long as the defendants conceal "not only their involvement, but the very conduct itself." *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981).

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going price-fixing conspiracy, establishes concealment as a matter of law), *cert. denied*, 454 U.S. 1164 (1982); *Robertson v. Seidman & Seidman*, 609 F.2d at 593 (expressly adopting the Seventh Circuit's approach in *Sperry*); *Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978) ("Even without affirmative acts on the part of defendants, then, a federal cause of action will accrue at the time when plaintiff in the exercise of reasonable diligence discovered or should have discovered the fraud of which he complains."); *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir.) ("Federal law since the case of *Bailey v. Glover* . . . has been that in cases involving elements of fraud neither a statute of limitations nor the equitable doctrine of laches can be said to begin to run until the fraud is or should have been discovered."), *cert. denied*, 400 U.S. 852 (1970).

[104] *Long v. Abbott Mortgage Corp.*, 459 F. Supp. 108, 118 n.7 (D. Conn. 1978) (Newman, J.).

[105] "The fraud and deceit which enable the offender to do the wrong may precede its perpetration. The length of time is not material, provided there is the relation of design and its consummation." *Wood v. Carpenter*, 101 U.S. at 143.

This Circuit has recently refined its approach to cases involving *self-concealing wrongs* and placed on the defendant the burden of proving that the plaintiff did not exercise due diligence. Thus, in *Richards v. Mileski*, the court held "[w]hen tolling is proper because the defendants have concealed the very cause of action, . . . they have the burden of coming forward with any facts showing that the plaintiff could have discovered . . . the cause of action if he had exercised due diligence." 662 F.2d at 71.[106] The jury in this case was so instructed. In finding for plaintiffs on the statute of limitations issue, the jury found that defendants had not proved by a preponderance of the evidence that plaintiffs failed to exercise reasonable diligence in pursuing their claims. Defendants do not seriously challenge that finding.

Before turning to apply these principles to defendants' principal assertions about the sufficiency of the evidence on fraudulent concealment, we pause to note an obvious, albeit often overlooked, proposition. The doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim. A key aspect of a plaintiff's case alleging fraudulent concealment is therefore proof that the plaintiff was not previously on notice of the claim he now brings. By "notice," we refer to an awareness of sufficient facts to identify a particular cause of action, be it a tort, a constitutional violation or a claim of fraud. We do not mean the kind of notice—based on hints, suspicions, hunches or rumors—that requires a plaintiff to make inquiries in the exercise of due diligence, but not to file suit.[107]

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[106] Accordingly, we reject defendants' suggestion that the District Court erroneously placed on them the burden of proof on this issue. *Richards* controls our disposition of this case, as it did that of the District Court, and, under *Richards*, the instruction was correct.

[107] When a plaintiff receives information sufficient to put him on inquiry notice, the statute of limitations will begin to

While the precise standard for notice that amounts to constructive discovery and triggers the statute of limitations is not precisely delineated, for our purposes the contours are sufficiently clear. For one, the plaintiff must know facts giving notice of the particular cause of action at issue, not of just any cause of action. *Richards* provides an example. Plaintiff Richards was a career employee with the United States Information Agency until 1955, when he resigned under the duress of false charges of homosexual activity. At the time, he knew the charges were false. Years later he brought suit against six former federal officials alleging a variety of tort injuries. The suit was dismissed as untimely. On appeal this court reversed and held that the complaint stated sufficient allegations of fraudulent concealment to toll the statute of limitations. It found persuasive Richards' argument that, while he was aware of the falsity of the charges in 1955, only in 1978 had he become aware that his superiors had knowingly filed false reports. On this issue, the court held that claims Richards might have brought in 1955 (such as wrongful discharge) and those he filed in 1978 were different—that it "was no mere 'detail' in 1955 that the false charges against Richards had been fabricated as part of a deliberate conspiracy against him, or that his own superiors rather than an unknown informant were the source of his misery" [108]—and that mere knowledge of falsity did not constitute such notice as to bar tolling the statute.

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run if the plaintiff does not reasonably exercise due diligence in conducting the inquiry. In other words, he is held to be on notice of all facts he could have learned through reasonably diligent inquiry. In this case, defendants, who had the burden of proving plaintiffs' lack of due diligence, offered no evidence of what plaintiffs could have done to find out more about their claims, short of filing suit. As a result, the motions for directed verdicts were properly denied if based on the plaintiffs' failure of diligence, and the jury's ruling is clearly reasonable.

[108] *Richards*, 662 F.2d at 69.

Second, plaintiff's knowledge of the grounds for a suit must generally extend to an awareness of the persons responsible for plaintiff's injury. We by no means imply that a plaintiff may postpone suit until he knows every defendant by name and title. However, simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant.[109] This Circuit's decision in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977), illustrates the point. Plaintiff Fitzgerald sued officials of the Air Force and the Executive Branch charging a conspiracy to deprive him of his civilian position with the Air Force and of his constitutional rights in retaliation for testimony he gave before Congress. We held there that Fitzgerald's prior administrative appeals disclosed that he had reason to know he was being eased out of his job in retaliation for his testimony in time to file his suit against the Air Force officials within the given period of repose. However, we also held that he had no reason to know of the involvement of a White House official until significantly later. Because the White House official was "a person of influence in a different center of power," *id.* at 229, the court declined to hold that Fitzgerald was on notice of his participation. We therefore must probe a plaintiff's knowledge to determine whether he was on notice of all possible defendants, and not just a subgroup, as well as the particular cause of action.

B. *The Tolling Doctrine Applied*

On the basis of the foregoing, our analysis is quite straightforward. We find that the record contains over-

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[109] A plaintiff is held to know that subordinates might be implicated if their superiors are involved in a wrong. *See Fitzgerald v. Seamans*, 553 F.2d 220, 229 (D.C. Cir. 1977). While such knowledge will not bar plaintiff's addition of other participants in the course of suit, including subordinates, it will bar plaintiff from filing suit only against subordinates after the statute of limitations has run on their superiors.

whelming and uncontradicted evidence of defendants' efforts to construct a scheme that would remain secret and that the wrong fits neatly under the "self-concealing" or "unknowable" label. At the same time we find that three plaintiffs were on notice of their claims against the FBI, though not against the District defendants, more than three years before they filed suit, and that the statute of limitations therefore has run on those particular claims.

1. *The Self-Concealing Wrong*

The FBI took numerous steps to assure that no aspect of its COINTELPRO program would come to the attention of the public, or, indeed, of anyone outside the FBI. Steps were also taken to limit knowledge of COINTELPRO operations even among FBI personnel. Thus, in any early FBI memorandum regarding COINTELPRO-Black Nationalist, it was written,

> You are also cautioned that the nature of this new endeavor is such that under no circumstances should the existence of the program be made known outside the Bureau and appropriate within-office security should be afforded to sensitive operations, and techniques considered under the program.

IV J.A. 1728. A later airtel from FBI headquarters again cautioned the Field Office agents that COINTELPRO proposals must be designed to avoid embarrassing the Bureau. IV J.A. 1735. The record discloses numerous ways in which the FBI sought to hide its activities. Two examples suffice. First, the Bureau published The Rational Observer on unwatermarked paper "[f]or the sake of security," IV J.A. 1853 (memorandum from SAC, WFO to Director, FBI), and falsely attributed authorship of the articles therein to "a small group of students," IV J.A. 1854. Second, the Bureau mailed out the "Give Them Bananas!" leaflet [110] anonymously, in "unmarked

[110] For a discussion of this activity, see Background section II, *supra*.

white envelopes," taking "all necessary steps to protect the identity of the Bureau as the source of these leaflets." [111] These affirmative efforts at concealment leave no doubt that the FBI defendants engaged in a "self-concealing" wrong. There also was ample evidence to find that the District defendants on their own engaged in activities that they deliberately concealed. They sent informants into the New Mobe, WMC, BUF, ECTC, Institute for Policy Studies, WAPAC, and into the two plaintiff organizations, who misrepresented their identities.[112] Moreover, the MPD Intelligence Division shredded all its political surveillance files in 1974. III J.A. 1317 (testimony of Jerry Wilson). Whether the MPD did so for housekeeping or for concealment purposes was a question of fact for the jury.

The record in this case is replete with examples of efforts to prevent public awareness of the conduct at issue in this case. Our review leaves no doubt of the existence of evidence that defendants deliberately constructed schemes of such a kind that plaintiffs would not even suspect that any outsider was meddling in their lawful activities, much less that their constitutional rights were being violated. Accordingly, this case properly went to

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[111] IV J.A. 1748-49 (messages between SAC, New York, SAC, WFO and Director, FBI); *see also* IV J.A. 1821-22 (airtel authorizing WFO to reproduce housing forms distributed by the Washington Mobilization Committee, fill them out with fictitious names and addresses, and return them to WMC, "[m]ak[ing] certain that these cannot be traced to the Bureau"); IV J.A. 1802-03 (anonymous mailings); IV J.A. 1823 (misidentifying FBI agents as a unit within the National Mobilization Committee (NMC) and surreptitiously countermanding NMC orders to its marshals and supplying misinformation).

[112] *See* note 30, *supra*. Of course, we do not imply that use of informants is improper. However, if those informants engage in improper activity, as was alleged here, their misrepresented identity surely is evidence of their concealment of the wrongful act.

the jury under the framework established by *Richards* for adjudicating claims of fraudulent concealment emanating from self-concealing wrongs, and we decline to hold that insufficient evidence supports the jury's verdict on this issue.[113]

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[113] The foregoing analysis also resolves this case under District of Columbia law, should that be the proper equitable tolling law to apply, *see* note 100, *supra*. Under local law, "fraudulent concealment requires that the defendant commit some positive act tending to conceal the cause of action from the plaintiff, although any word or act tending to suppress the truth is enough." *Richards*, 662 F.2d at 70. Defendant "must have done something of an affirmative nature designed to prevent discovery of the cause of action. . . . [*A*]*ny statement, word or act which tends to suppress the truth raises the suppression to that level.*" *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191-92 (D.C. 1980) (emphasis added). Moreover, "a defendant cannot avail himself of the bar of the statute of limitation, if it appears that he has done anything that would tend to *lull* the plaintiff into inaction . . . ." *Hornblower v. George Washington Univ.*, 31 App. D.C. 64, 75 (1908) (quoted in *Davis*, 412 A.2d at 1192 n.15) (emphasis added)). Plaintiffs' case satisfies these grounds for tolling the statute. The record discloses numerous instances in which defendants misrepresented their identities and their activities, and these affirmative misrepresentations prevented the plaintiffs from discovering their cause of action. The nature of the misrepresentations is indistinguishable from that involved in *Richards*, *see* 662 F.2d at 70 (applying local law), and requires tolling here as it did in that case.

One established *defense* to fraudulent concealment under District of Columbia law is "that the plaintiff knew, or by the exercise of due diligence could have known, that he may have had a cause of action." *Estate of Chappelle v. Sanders*, 442 A.2d 157, 158 (D.C. 1982). Because the District of Columbia characterizes due diligence as a defense, the burden of proof on that issue squarely rests with defendants, and the same analysis applies as under the federal doctrine. *See* note 107, *supra* (discussing defendants' failure to prove lack of due diligence).

Similarly, as under federal law, plaintiffs' knowledge of their cause of action precludes reliance on the tolling doctrine. Thus, our analysis of plaintiffs' knowledge, and our conclu-

2. *Notice to Trigger the Statute of Limitations*

Up to now, we have determined, first, that the evidence supports the conclusion that defendants concealed their activities—by contriving schemes that were by their nature unknowable—and that defendants failed to offer evidence of facts plaintiffs might nevertheless have uncovered with due diligence. Thus, unless we determine as a matter of law that plaintiffs nonetheless had notice of the cause now sued upon, plaintiffs will have proved "fraudulent concealment." We turn now to this last inquiry.

Initially, we must make clear what we are and are not seeking. Plaintiffs recovered in the District Court on a claim that their First Amendment rights were infringed. We therefore look only for evidence of knowledge of facts about that claim. Knowledge of possible other wrongs, such as illegal wiretaps or burglaries, or of proper law enforcement activities aimed at plaintiffs, such as surveillance, surely do not create a cause of action under the First Amendment by themselves and will not meet our standard of notice.

The FBI defendants suggest a variety of incidents whose occurrence they believe placed plaintiffs on timely notice of their claims against the FBI. First, they point to articles by former FBI Special Agent Robert Wall, published in the New York Review of Books on January 27, 1972, and in the Potomac Magazine, a Sunday supplement to the Washington Post, on March 5, 1972.[114] The articles by and about Wall purported to describe secret FBI activities, including the existence of COINTELPRO-New Left and its intent to disrupt New Left and antiwar

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sion, *infra*, that three plaintiffs knew of their claims more than three years before filing suit, apply under local law as well and require the same result.

[114] In addition, an article about Special Agent Wall appeared in the Washington Star on January 13, 1972, and he appeared on public television in the Spring of 1972.

groups, FBI infiltration of New Left groups, the FBI's effort to exploit dissension between the New Mobilization Committee and the Black United Front arising out of the "head-tax" demand, the FBI's investigation of the Poor People's Campaign, and the FBI's investigation of the Institute for Policy Studies and persons associated with it. Defendants remind us that several plaintiffs admitted to reading these articles more than three years prior to filing suit. Second, other information was publicly available regarding FBI activities, according to defendants. They point to testimony in a separate civil action regarding FBI investigations of the New Mobilization Committee, and to disclosures (in unidentified publications) following burglary of an FBI office.[115] The FBI defendants concede, however, that no plaintiff admitted to being aware of such information. Third, the FBI defendants detail specific instances in which each plaintiff knew or suspected he or she was the subject of an FBI investigation or surveillance.

The District defendants reiterate many of the same pieces of evidence that the FBI defendants offer. They also point to a Washington Post article, published in June 1973, in which a former MPD officer described MPD efforts to infiltrate the Institute for Policy Studies and the Student Mobilization Committee, and his own (apparently unauthorized) efforts to coordinate electronic surveillance of demonstrators with federal law enforcement groups.[116]

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[115] *See* Brief of FBI Appellants, p. 26.

[116] *See* Brief of District of Columbia Appellants, pp. 38-44. Plaintiffs respond that this Washington Post article was not admitted at trial and is not properly before us as evidence. Brief of Appellees, p. 60 n.45. We need not decide whether reference to the article is proper, however, because the District defendants direct us to no evidence that any plaintiff read the article. We decline to hold as a matter of law that any newspaper article containing allegations—and not even allegations of activities amounting to First Amendment violations—somehow places all citizens on notice of their constitutional causes of action.

We are not persuaded that any of these examples, *standing alone*, suffices to have put plaintiffs on notice of their claims. A person's suspicion that he is a target of lawful law enforcement activity, such as surveillance, or even that his organization has been infiltrated by informants, cannot conceivably constitute notice of possible constitutional violations, without creating the anomalous situation of requiring persons to file suit on a hunch, only to be dismissed for failure to state a claim.[117] A court simply cannot "require that an aggrieved party have proceeded from the outset as if he were dealing with thieves." *Hudak v. Economic Research Analysts, Inc.*, 499 F.2d 996, 1002 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). To require potential plaintiffs to spin a tale of unconstitutional activity from a mere awareness of lawful investigation would impose just such a burden of omnipresent suspicion.

Nor does the mere fact that a plaintiff might have read a newspaper article detailing an FBI scheme to disrupt certain organizations[118] cast upon him a duty to presume that he was a target and to file suit. In a different setting, we declined to infer notice of an accounting firm's fraudulent practices on the basis of one newspaper article criticizing certain accounting practices, and held, "As a matter of law, we believe that one article challenging the accounting procedures of a reputable firm is insufficient to impute knowledge of fraud to appellants." *Wachovia*

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[117] Mere surveillance does not create a cause of action, *Laird v. Tatum*, 408 U.S. 1 (1972), and certainly does not put anyone on notice that the person under surveillance is a target of a scheme to expose, discredit and disrupt organizational activities. *See Fifth Avenue Peace Parade Comm. v. Gray*, 480 F.2d 326, 332 (2d Cir. 1973) (affirming dismissal of civil rights complaint on ground that allegations of lawful surveillance do not suffice to state a justiciable controversy), *cert. denied*, 415 U.S. 948 (1974).

[118] *A fortiori*, if plaintiffs did not even read the publication they have no such duty.

Bank & Trust Co. v. National Student Marketing Corp., 650 F.2d 342, 349 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981). While such an article might trigger a duty to inquire, we do not believe that such seemingly outrageous allegations as appeared, *unverified*, in the Wall articles on their own constitute *as a matter of law* notice of constitutional violations to all unidentified victims. This is particularly so in a case such as this one, in which plaintiffs' injury, at least initially, was difficult to identify and, consequently, would not necessarily have provided verification that plaintiffs were targets of the FBI's covert activities. We do not, of course, imply that an article can never constitute notice, but only that *it was within the range of the jury's authority to resolve the issue.*

Nonetheless, as to some plaintiffs, not one but several of the factors to which defendants point converged; as a matter of law, we hold that the confluence of factors placed three plaintiffs on notice of their claims. Those plaintiffs who not only read the Wall articles more than three years before filing suit, but also knew that they were subjects of FBI investigation, had enough timely information to claim that *they* were victims of unconstitutional FBI activities. The FBI defendants' directed verdict motions as to those plaintiffs were therefore improperly denied. These plaintiffs did not, however, have any reason to know of District involvement; therefore, their claims against the District defendants are not time-barred.

According to the FBI defendants, four plaintiffs, Abbott, Bloom, Booker and Waskow, were aware in early 1972 of the Wall allegations, and also of other "red flags" signaling a cause of action. We consider each of these plaintiffs in turn.

Mr. Booker: Mr. Booker testified that he read an article by Special Agent Wall in the Washington Post, evidently at the time of its publication. II J.A. 829-30 (testimony

of Reginald Booker). The article specifically noted the existence of COINTELPRO and reported that the project was designed "to thwart and undermine the activities of any organization that fell into the category of 'New Left.'" IV J.A. 2183, 2188 (Wall article). More specifically, the article noted that the FBI tried to "create dissent among the various groups involved in the New Left to prevent them from working together," *id.*, and it specifically gave as an example the FBI's forgery of a letter to the NMC demanding payment for Black support of NMC peace efforts. *Id.* Mr. Booker had been present at BUF meetings in the late 1960s focusing on whether BUF should propose that a head tax be paid by demonstrators coming into Washington, *see* II J.A. 811-12 (testimony of Reginald Booker), and believed no such policy ever was adopted. *Id.* Moreover, he had had meetings with FBI agents in which they had tried to get him to be an informant. *Id.* at 826. Thus, Mr. Booker was on notice both of the injury he had suffered and of the *unlawful* intent on the part of the FBI that made the injury actionable. The case is easily distinguishable from the situation in *Richards*, in which the plaintiff knew of the former (injury) but not the latter (unlawful motive), and requires a contrary result.[119]

Mr. Abbott: Mr. Abbott is in a position similar to that of Mr. Booker. He recalls that in 1972 he "read . . . very avidly" the Wall articles in the New York Review of

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[119] Mr. Booker's participation in the head tax controversy allowed him to verify for himself the Wall allegations on that issue. Under such circumstances, we do not require that the statute have been tolled until the Government made a formal admission of the existence of COINTELPRO.

In addition, we do not toll the statute because plaintiff did not know by name the officials in the FBI organization whom he should sue. Once one is on notice of a conspiracy within an organization, the statute starts to run on a claim, subject to the addition of defendants as discovery progresses. The three-year period of repose, following discovery of the cause of action, provided ample time to identify the responsible officials.

Books and the Washington Post. II J.A. 934-35 (testimony of Sammie Abbott). At the same time, he had personal knowledge of the head tax issue discussed in the articles, *id.* at 919-20, knew the FBI was interested in using him as an informant, *id.* at 924, and well before 1972 he was aware that his telephone was tapped. *Id.* at 931-32. As with Mr. Booker, this dual awareness of injury and motive sufficed to put Mr. Abbott on notice of his constitutional claim against the FBI.

Mr. Bloom: Mr. Bloom is in a position like that of Messrs. Abbott and Booker. He, too, testified that he read the Wall article in the Washington Post when it was published and heard about the New York Review of Books piece. II J.A. 702-03 (testimony of Abe Bloom). He was involved in the head tax controversy discussed in the article, *id.* at 678-80, and he also suspected he was under surveillance. *Id.* at 663. Most pointedly, Mr. Bloom testified that after reading the Wall article, he came to believe that the Rev. Moore demand letter was written by an FBI agent. *Id.* at 702-03. With such strong evidence that Mr. Bloom knew of his injury, and of the role of the FBI in causing that injury, as early as 1972, we do not believe his claims against the FBI should have gone to the jury.

Mr. Waskow: The facts regarding Mr. Waskow are not so clear, and we believe his claims properly went to the jury for resolution of the fraudulent concealment issue. First, Mr. Waskow admitted that he had read articles about Special Agent Wall, but did not testify as to when he read them; nor did he describe them in sufficient detail to enable us to determine which of many articles on COINTELPRO he might have read, or whether they might have put him on notice of the intent of the FBI's COINTELPRO program. *See* II J.A. 902-03 (testimony of Arthur Waskow). We cannot conclude on this basis that Mr. Waskow read any article by or about Special Agent Wall more than three years before filing suit.

While there was evidence that Mr. Waskow suspected that he and the Institute for Policy Studies were targets of an FBI investigation, *see id.* at 884, 897-99, and that he knew about the head tax issue, *id.* at 868, on their own such suspicions certainly do not amount to knowledge of constitutional violations. The jury could reasonably have concluded that Mr. Waskow did not know the contours of his claim until mid-1973.

In sum, we hold that the motions for directed verdicts on timeliness grounds should have been granted in favor of the FBI defendants only, as to plaintiffs Booker, Abbott and Bloom. As a matter of law, each of the three was on notice of his claim more than three years before filing suit. None of the other plaintiffs testified to sufficient awareness of his injury and the motive with which it was inflicted to require the issue to be taken from the jury. Moreover, we find from the record that none of the plaintiffs was cognizant of facts regarding the District defendants that should have led them, as a matter of law, to file constitutional claims against the District or its employees. The District and MPD represent a wholly separate organization from the FBI and, on the basis of *Fitzgerald v. Seamans*, we decline to hold plaintiffs to a constructive knowledge of the possible involvement of organizations outside the FBI.

C. *Remaining Objections to the Fraudulent Concealment Instructions*

Th FBI defendants challenge the trial court's failure to instruct the jury that "mere silence by a defendant is not fraudulent or deliberate concealment." Brief of FBI Appellants, p. 67. They also claim as error the court's instruction that concealment for law enforcement purposes may be deemed to be fraudulent or deliberate concealment; they assert that this instruction conflicts with alleged principles that concealment by a third party may not be attributed to named defendants, and that conceal-

ment must have been wrongful. *Id.* According to defendants, these "erroneous" instructions entitle them to a new trial. We disagree.

First, the unrefuted evidence presented at trial made absolutely clear that the FBI conspirators here had not merely been silent, but had made affirmative misrepresentations, and had assumed false identities as protestors, students, and parade coordinators, to conceal their official status. Much as in *Richards*, defendants here admitted that they misrepresented their actual position and then remained silent, knowing their representations were false. On those facts, an instruction that "mere silence" does not constitute concealment could only have been confusing. Regardless whether a proposed instruction correctly states a legal abstraction, when the instruction is not applicable to the facts, it is properly denied.[120]

Second, we reject both defendants' characterization of the District Court's instruction on concealment for law enforcement purposes and its challenge to that instruction. The court did not instruct that concealment for law enforcement purposes "may be deemed to be fraudulent or deliberate concealment," as though all law enforcement secrecy amounted to fraudulent concealment. Rather, the court instructed that if there was deliberate concealment, "it doesn't make any difference whether the defendant or conspiracy kept the material [information] from the plaintiff because the agency employing the defendant or the conspirators believed that law enforcement considerations required concealment." [121]

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[120] 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2552, at 628-29 (1971).

[121] III J.A. 1668. The instruction read:

> [I]t doesn't make any difference whether the defendant or conspiracy kept the material [information] from the plaintiff because the agency employing the defendant or the conspirators believed that law enforcement considerations required concealment, or whether the material facts

Neither of defendants' challenges to this instruction warrants a new trial. For one, the instruction was not contrary to defendants' "principle" that concealment by a third party may not be attributed to the named defendants—assuming, *arguendo*, that we accept that "principle." First, the instructions generally required that concealment be attributable to the defendant or, with the conspiracy claims, to the overall conspiracy; [122] and second, the particular instruction at issue addressed concealment of information *by defendants* because defendants' employers believed it necessary, not concealment by the employers. Nor was the instruction contrary to defendants' "principle"—which, again, we only accept *arguendo*—that concealment must be wrongful. The District Court properly noted that, as in *Smith v. Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), *cert. denied*, 453 U.S. 912 (1981), and *Fitzgerald v. Seamans*—cases in which we found claims of Government secrecy to constitute adequate allegations of concealment—the "wrongfulness" in this case "consisted of defendants' efforts to conceal COINTELPRO and the MPD activities from the public despite the unlawfulness of the FBI and MPD programs." [123] In other words, to the extent that "*wrongful* concealment" is required, it may be "wrongful" to devise a scheme to conceal information even if done on the belief that one's superiors believe law enforcement purposes to compel secrecy. The instruction as given did not conflict with this principle. Moreover, we suspect that this argument is but a masked effort to challenge the District Court's failure to charge that concealment must be wrongful. Since defendants did not raise this objection below, we decline to speculate further on their perceived inconsistencies between the instruction and the asserted "principle." We find none and reject the claim.

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were concealed for purposes of impeding the plaintiffs' prosecution of their claim.

[122] *See* III J.A. 1667-68.

[123] *Hobson v. Wilson*, 556 F. Supp. at 1176.

IV. *Defendant Courtland Jones*

Defendant Jones raises several arguments unique to his appeal that result from the protracted procedural history of plaintiffs' case against him. Our review of the details of that history convinces us that Mr. Jones' assertions are without merit.[124]

We begin with a summary of the procedural history of the case against Mr. Jones, the details of which are critical to our decision. Mr. Jones was not named as a defendant in the first complaint filed by plaintiffs in July 1976. "By 1977, however, once discovery had begun, plaintiffs learned of Jones' role in the 'internal security' activities of the WFO, and apparently believed him to have injured them in connection with COINTELPRO effort at the WFO." *Hobson*, 556 F. Supp. at 1184. Plaintiffs therefore included Mr. Jones as one of the FBI defendants named in their amended complaint filed October 28, 1977.[125] Plaintiffs made several attempts thereafter to serve Mr. Jones, first at the WFO, later at his residence. Mr. Jones has admitted that on December 19, 1978, he was aware that the papers were served at his residence but, because the papers were left at his residence, and not served on him personally (or left with a person of suit-

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[124] Mr. Jones also raises arguments he shares with the other defendants, relating to statute of limitations and sufficiency of evidence. We treat these arguments in our discussions of the other FBI defendants and need not repeat them here.

[125] According to the District Court's opinion denying defendants' motions for judgment notwithstanding the verdicts, the amended complaint was filed October 28, 1977. *Hobson*, 556 F. Supp. at 1163. We have checked both the civil docket sheet and the original record and confirmed that October 28, 1977, is the correct date. We therefore conclude that Mr. Jones' unsupported contention that the amended complaint was filed December 7, 1977, is erroneous. The civil docket discloses that on that date summonses were delivered to the United States Attorney. As we make clear, *infra*, that date is irrelevant for statute of limitations purposes. Particularly

able age), he has claimed he was not served.[126] In December 1978, pursuant to 28 C.F.R. § 50.15 (1977), Mr. Jones requested that the Department of Justice appoint counsel for him. *Hobson*, 556 F. Supp. at 1184. The Department assigned to him the lawyer who was then and throughout trial continuously representing all the FBI defendants.

In April 1979, Messrs. Jones and Schlarman, another defendant, moved for dismissal of the claims against them, on the ground that "service of process was not effected upon a person of 'suitable age and discretion' at their homes in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure." *Hobson*, 556 F. Supp. at 1184 (quoting a November 9, 1979, memorandum opinion by Judge Pratt). The District Court judge granted the motion "without prejudice to fresh attempts to serve process." *Id.*

In November 1980, after the case was reassigned to Judge Oberdorfer, before whom it was tried, the court directed the parties to " 'propose a practical solution for the problem posed by the failure to effect service on a number of defendants,' including defendant Jones." *Id.* at 1185 (quoting *Hobson v. Wilson*, No. 76-1326 (D.D.C. Nov. 14, 1980)). According to Judge Oberdorfer,

> At status calls held in late 1980 and in January 1981, the Court discussed the failure of plaintiffs to serve Jones and other defendants; however, counsel for the "served" FBI defendant[s] declined to take any action, claiming not to represent those unserved defendants and because those defendants "are not under the personal jurisdiction of the Court."

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since Mr. Jones contends he was not served on December 7, 1977, that date should undoubtedly be irrelevant to him.

[126] *See* Affidavit of Courtland J. Jones, March 14, 1979, I J.A. 198.

Id. (quoting Letter of David M. White (dated Nov. 25, 1980), filed as Attachment to Order of Dec. 8, 1980).

On June 21, 1981, plaintiffs perfected service of process on Mr. Jones. Pretrial orders then in effect scheduled discovery to terminate at the end of July 1981. Mr. Jones did not seek an extension of the discovery period,[127] but in August 1981 moved for dismissal of the claims against him, *inter alia*, for failure to prosecute under Rule 41 of the Federal Rules of Civil Procedure. He argued principally that he would be unfairly disadvantaged by trial in the autumn of 1981. The District Court rejected his motion:

> [H]e will suffer no prejudice if plaintiffs are precluded from raising any claim against him not stemming from acts already involved in the litigation against other defendants who are represented by Jones' counsel, and who were with Jones in the Federal Bureau of Investigation at the time of his allegedly unlawful conduct. Counsel for Jones is invited to submit with his pretrial brief an appropriate order concerning claims to be precluded.

Id. at 1185 (quoting *Hobson v. Wilson*, No. 76-1326, slip op. at 5 (D.D.C. Oct. 29, 1981)). Mr. Jones' FBI counsel did not submit the proposed order to the court.[128]

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[127] *See Hobson*, 556 F. Supp. at 1185. In contrast, plaintiffs sought and received several extensions of the discovery termination date for reasons unrelated to Mr. Jones. *Id.* at n.37.

[128] Instead, Mr. Jones' FBI counsel sought to withdraw from representation of Mr. Jones, on the ground that the court denied Mr. Jones' motion to dismiss only because he shared counsel with other FBI defendants. Another attorney entered a limited appearance on Mr. Jones' behalf in the event that the motion to withdraw was granted. The court denied the FBI counsel's motion to withdraw but told the attorney he had leave to appear for Mr. Jones at trial. The court also denied Mr. Jones' motion for reconsideration of the decision not to dismiss. "Jones' FBI counsel still did not file the proposed order sought in the October 29 Order, and counsel who had made the limited appearance on Jones' behalf appeared

After trial, Mr. Jones renewed his argument that dismissal was required under Rule 41 for lack of prosecution. The court again disagreed.

On appeal, Mr. Jones raises several arguments. First, he contends that even if the statute of limitations was properly tolled as to all defendants named in the July 1976 complaint, it was not tolled as to himself, because he was not named in a complaint until the following year. In addition, he argues, the date of the amended complaint does not relate back to the original complaint because it does not meet the requirements of Rule 15(c) of the Federal Rules of Civil Procedure. Second, he argues that the statute of limitations was not tolled until service of process was perfected in 1981, and that plaintiffs surely cannot argue that they did not know of the claim until three years before 1981. Third, he again renews his assertion that the action should have been dismissed under Rule 41 for failure to prosecute. We consider each argument in turn.

First, as even Mr. Jones appears to concede,[129] the first official verification of the COINTELPRO program occurred in November 1974, when Attorney General Saxbe held a widely publicized press conference. That press conference led the Fifth Circuit to conclude, in *United Klans of America v. McGovern*, 621 F.2d 152, 153-54 (5th Cir. 1980), that the statute of limitations on plaintiffs' claims challenging COINTELPRO began running in November 1974, because "[w]here events receive such widespread publicity, plaintiffs may be charged with knowledge of their occurrence." *Id.* at 154. In *United Klans*, the court observed that Attorney General Saxbe had identified plaintiffs' group as one of the COINTELPRO targets. We need not consider here whether that press conference as a mat-

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not to take an active role in court on Jones' behalf." *Hobson*, 556 F. Supp. at 1185.

[129] Brief of Appellant Jones, p. 22 n.*.

ter of law put all plaintiffs on notice of their claims against the FBI. We have absolutely no reason to believe that the plaintiffs whose actions against the FBI remain in light of our statute of limitations discussion had notice *before* that press conference. Mr. Jones has not pointed us to evidence to that effect. Thus, assuming *arguendo* that the conference made public sufficient information to put all plaintiffs on notice, they still filed their claim against Jones in October 1977, within three years of that press conference.[130] We therefore conclude that plaintiffs amended their complaint, and filed the amended complaint, within three years of the earliest date on which they might have had notice of their claims on the basis of public knowledge. We reject Mr. Jones' argument that the action against him was not timely filed and find it unnecessary to consider whether the filing date of the amended complaint relates back to the original complaint.

Mr. Jones next argues that even if the amended complaint was filed within the period of repose, the statute was not tolled until service was complete. We find that this argument is based on an incorrect view of the role of service of process in a case in this Circuit and, accordingly, reject it.

It is now well-established that in *diversity* actions, in which a federal court applies a state statute of limitations, the court must also follow the state's rule as to whether the filing of a complaint, the service of process, or some other procedural hurdle commences the action and tolls the statute of limitations. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). While it is also quite clear that a federal court confronted with a federal cause

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[130] Mr. Jones argues that the amended complaint was filed in December 1977, more than three years after that conference, and that the statute of limitations had run on the claim unless the amended complaint relates back. Because the December date is incorrect, we need not consider whether the amended complaint should relate back. *See* note 125, *supra*.

of action, but borrowing a state statute of limitation in the absence of a federally prescribed limitation period, must follow federal law as to the procedural steps that commence an action for statute of limitation purposes, the Supreme Court's decision in *Walker v. Armco Steel Corp.* has led some litigants to argue that State law controls.[131] On this point, we note that Justice Marshall, writing in *Walker*, expressly stated that the holding did not extend to federal causes of action;[132] however, we need not reconsider that issue here because, under decisions both of this court in federal actions and of the District of Columbia Court of Appeals, it is unquestionably the case that the filing of a complaint commences an action for statute of limitation purposes. *See Jordan v. United States*, 694 F.2d 833, 837 & n.7 (D.C. Cir. 1982) (appellants need only timely filing, not proper service, to toll the statute of limitations in federal tort claims action); *Varela v. Hi-Lo Powered Stirrups, Inc.*, 424 A.2d 61, 62 (D.C. 1980) (en banc) (holding that D.C. law requires "only the filing of

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[131] In a persuasive opinion, District Court Judge Leval considered whether *Walker* overruled a Second Circuit case holding that the Federal Rules of Civil Procedure make the filing of a complaint the event that commences a federal civil rights action. *Cohen v. Board of Educ.*, 536 F. Supp. 486, 493-95 (S.D.N.Y. 1982) (discussing *Bomar v. Keyes*, 162 F.2d 136, 140 (2d Cir.), *cert. denied*, 332 U.S. 825 (1947)). He concluded that *Walker* addressed concerns unique to diversity actions, that the Supreme Court carefully has distinguished actions based on federal law when it has decided diversity cases such as *Walker*, and that federal law controls in federal actions after *Walker*.

[132] The Court wrote, "We do not here address the role of Rule 3 as a tolling provision for a statute of limitations, whether set by federal law or borrowed from state law, if the cause of action is based on federal law." 446 U.S. at 751 n.11. *See also Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1949) (distinguishing suits to enforce rights under a *federal* statute in holding that in diversity suits court must apply state rules on the commencement of an action).

a complaint to commence an action and thereby toll the statute of limitations," and that questions about plaintiff's diligence in obtaining service of process should be addressed by means of a motion for failure to prosecute). There can be no doubt that the statute tolled as to claims against Mr. Jones at the latest when the amended complaint was filed. Delay in service of process is an issue more properly addressed as an element of a motion to dismiss for failure to prosecute. We now turn to consider Judge Oberdorfer's ruling on that issue.

In reviewing a ruling of the trial court on a motion to dismiss under Rule 41(b), our task is extremely limited. Absent a clear abuse of discretion, we must affirm the ruling of the trial court. *Cherry v. Brown-Frazier-Whitney*, 548 F.2d 965, 969-70 (D.C. Cir. 1976); *Sheaffer v. Warehouse Employees Union*, 408 F.2d 204, 206 (D.C. Cir.), *cert. denied*, 395 U.S. 934 (1969). Our inquiry is especially circumscribed when we review a refusal to dismiss; it is generally accepted that cases in that posture warrant a particularly narrow standard of review, *see Finley v. Parvin/Dohrmann Co.*, 520 F.2d 386, 390 (2d Cir. 1975),[133] under which discretion

> is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then

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[133] Some courts apply narrow review as well to a trial judge's grant of a dismissal for failure to prosecute, *see Marshall v. Sielaff*, 492 F.2d 917, 918 (3d Cir. 1974); *Theilmann v. Rutland Hospital, Inc.*, 455 F.2d 853, 855 (2d Cir. 1972), whereas others conduct a more exacting review in that circumstance. *See, e.g., Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976) (only reverse trial court on ground of a "definite and firm conviction" that court committed a clear error of judgment); *Pearson v. Dennison*, 353 F.2d 24, 28 n.6 (9th Cir. 1965) (by term "abuse" court means trial court "made a mistake").

> it cannot be said that the trial court abused its discretion.

Finley, 520 F.2d at 390 (quoting *Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942)). This narrow standard is attributed to the procedural posture that a refusal to dismiss will have when it reaches the appellate court. "There is a natural reluctance to reverse a plaintiff's judgment on the merits because of a pretrial order refusing to dismiss for want of prosecution." *Finley*, 520 F.2d at 391. The reason is simple: a trial court's discretionary denial of a defendant's motion to dismiss is not nearly so harsh as would be an appellate court's decision that a judgment for plaintiffs must be reversed and remanded for a dismissal with prejudice.

In this case, while we share Judge Oberdorfer's view that plaintiffs displayed "unusual indifference" to the requirement of service,[134] we also find entirely reasonable his conclusion that defendant Jones was not prejudiced by the delay. Absent prejudice, we cannot find that the motion to dismiss was improperly denied, particularly since plaintiffs obviously were trying to prosecute their claim when the motion was filed. Moreover, we are persuaded that the alternative to dismissal that was imposed—limiting plaintiffs' claims against Mr. Jones to those stemming from acts already involved in the litigation against other defendants—adequately protected Mr. Jones' interests.

This case is immediately distinguishable from those in which delay in service causes defense counsel to rush in their preparations. *See, e.g., Anderson v. Air West, Inc.*, 542 F.2d 522, 525 (9th Cir. 1976). Here, Mr. Jones shared counsel with the other defendants and, because of the court-imposed limitation on claims against Mr. Jones, he received the full benefit of those preparations. Mr. Jones' failure both to request an extension in discovery,

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[134] *See Hobson*, 556 F. Supp. at 1185-86.

and to submit suggestions of claims to be precluded, cannot now be turned against the plaintiffs. Dismissal is a severe sanction, and alternative sanctions are not only permissible but often preferred. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2370, at 203 (1971) ("appellate courts do not look favorably on dismissal with prejudice if there are lesser sanctions that could vindicate the purpose of the rules"). It simply is not for a defendant to snub the court's alternative of limiting the claims against him and then argue prejudice.

Moreover, this case differs from one in which a defendant on whom tardy service is perfected is unfairly robbed of an expectation that he will not have to defend a claim. Here the trial judge made clear to FBI counsel that plaintiffs sought to serve Mr. Jones and that the court wanted the parties to work out a procedure. It was undoubtedly reasonable for Judge Oberdorfer to conclude that Mr. Jones' appointed counsel relayed this information.[135]

On the basis of the foregoing, we conclude that the District Court did not abuse its discretion in denying Mr. Jones' motion to dismiss under Rule 41(b).

V. *Juror Contact*

After the close of evidence but before closing arguments in this action, plaintiffs' counsel contacted, and had a brief conversation with, an excused juror. All defendants argue that the conversation deprived them of a fair trial and ask for a new trial. While we fully agree with the District Court's conclusion that the juror contact was improper, we nonetheless agree with the trial judge's determination that no prejudice flowed from this misconduct so as to warrant a new trial.

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[135] *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2370, at 204 (1971).

On December 14, 1981, following the close of evidence, but prior to closing arguments, one of the plaintiffs' attorneys contacted a person who had sat on the jury early in the trial but had been excused on December 3, 1981. In a telephone conversation, the attorney discussed with the dismissed juror her view of the case and the evidence. Four days later, on December 18, the court examined the juror on the record [136] and invited questions from counsel. The same day, the court examined the lawyer who had made the contact.[137] Thereafter, counsel for all defendants moved for a mistrial, which was denied.

According to the testimony, the conversation with the juror was extremely brief. The dismissed juror freely offered *her opinions* regarding the evidence she had heard, while denying that the jurors had discussed the merits of the case among themselves.[138] According to the attorney, who testified from her notes of the conversation, the juror commented that the quantity of evidence was overwhelming and confusing, that the plaintiffs appeared to be able to accomplish the goals they had set out despite defendants' activities, that she did not understand the significance of The Rational Observer, that she thought it was a "major point that the FBI was involved in sending false signals to marshals during certain demonstrations," that she was not convinced the defendants managed to incite the police against "the peace people," and that the statute of limitations questions seemed very difficult.[139] The

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[136] The transcript of the interview appears in the Joint Appendix, III J.A. 1714-20.

[137] The transcript of the statement of the attorney who contacted the juror appears at III J.A. 1705-08.

[138] *See* III J.A. 1715 (testimony of dismissed juror); III J.A. 1707 (testimony of attorney).

[139] *See* III J.A. 1706-07.

juror's recollection of the conversation, while less precise, was substantially in accord.

The District Court focused on the possible impact of the conversation on the fairness of the trial and expressly found that "there was no prejudicial impact on the jury's verdicts stemming from the incident." *Hobson*, 556 F. Supp. at 1188.[140] In taking this approach, the court adhered to the Supreme Court's decision in *Mattox v. United States*, 146 U.S. 140 (1892), which establishes a presumption that contact with a *sitting* juror should invalidate a verdict unless the harmlessness of the contact is shown. While we agree generally with the trial court's analytical process, we believe that this case is not directly controlled by *Mattox* but is rather a logical extension of it, and should be recognized as a variation on the circumstance

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[140] The trial court suggested that the attorney's conduct disregarded the court's instruction when the juror was dismissed and perhaps Local Rule 1-28 as well. Yet, the court correctly suggested, *the relevant inquiry is prejudice, not culpability. Cf. Smith v. Phillips*, 455 U.S. 209, 220 & n.10 (1982) (effect on trial of prosecutorial misconduct, not blameworthiness of prosecutor, is crucial inquiry in determining whether due process requires a new trial). Therefore, while we in no respect condone counsel's behavior, its propriety is not directly before us. We do note, however, that under existing local court rules and practice the issues, surprisingly, are not entirely free from doubt. For one, the court instructed the juror, in the presence of counsel, not to discuss the case with anyone "on the outside." *Id.* at 1187. Arguably this instruction did not preclude conversations with trial counsel. Moreover, Local Rule 1-28 bars conversations with jurors during trial, and conversations with discharged jurors after trial except by leave of court. It focuses attention on jurors who participated in rendering the verdict. Counsel's action plainly was indiscreet, a breach of decorum and unnecessarily suggestive of an appearance of impropriety; whether it involved any technical violations of court rules we need not decide. We leave to the appropriate forum a consideration of what, if any, disciplinary action may be warranted, and what, if any, rule changes are necessary to prevent this kind of conduct in the future.

of *Mattox*. Indeed, no case to which we have been pointed, nor that we have found, addresses the standard of review of attorney contact with an excused juror. Moreover, confusion even about the *permissibility* of such contact apparently gave rise to the incident we confront.[141] Accordingly, we will try here to make absolutely clear the conduct we will expect of officers of the court, and the consequence of a failure to adhere to such principles.

That the *Mattox* rule is firmly entrenched in our jurisprudence is beyond dispute. The case leaves no doubt that once an improper communication has been made to a juror, a presumption of prejudice arises that is rebuttable only by a strong contrary showing. As the *Mattox* Court held: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox*, 146 U.S. at 150; *see also Remmer v. United States*, 347 U.S. 227, 229 (1954). While *Mattox* was a criminal case, the same principle has been applied to civil actions. *See Rinker v. County of Napa*, 724 F.2d 1352 (9th Cir. 1983) (section 1983 action); *Krause v. Rhodes*, 570 F.2d 563 (6th Cir. 1977) (section 1983 action), *cert. denied*, 435 U.S. 924 (1978); *United States v. Harry Barfield Co.*, 359 F.2d 120 (5th Cir. 1966) (taxpayer refund suit); *Washington Gas Light Co. v. Connolly*, 214 F.2d 254 (D.C. Cir. 1954) (tort action); *Port*

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[141] In their brief, plaintiffs' counsel insist that local federal court rules in Maine and New York do not govern contact with jurors, that numerous states have no such rules, and that no state has any rule prohibiting conversations with individuals dismissed from juries during trial. Brief of Appellees, p. 83 n.69. For reasons stated in footnote 140, *supra*, we have no need to consider the rules of other courts or other circuits. Moreover, regardless what the rules say, we believe such conduct to be wholly improper; with this opinion we put counsel in this Circuit on clear notice of the impropriety of engaging in conversation with excused jurors during trial.

Terminal & Warehousing Co. v. John S. James Co., 92 F.R.D. 100 (S.D. Ga. 1981) (antitrust action).

Both *Mattox* and the Supreme Court's subsequent decision in *Remmer v. United States* considered the possible prejudicial effect of third-party contacts with sitting jurors and determined that the likelihood of prejudice warrants imposition of a rebuttable presumption of prejudice. Following the same analysis, we hold that attorney contact with an excused juror, during trial, is potentially harmful and similarly creates a rebuttable presumption of prejudice. We believe that concerns related to those implicated in *Mattox* and *Remmer* exist in this case and warrant such a presumption to safeguard against prejudice. However, the two scenarios also differ significantly. These difference should come into play when the judge determines whether the contact has in fact been prejudicial. We would anticipate, for example, that in the case of an excused juror, rebuttal will be more easily accomplished, and the trial judge will find actual prejudice with less frequency.

Behind the *Mattox* presumption of prejudice lies the most fundamental premise of our jury system: that each juror enters a case impartial, and throughout trial remains uncontaminated by outside pressures. Trial by jury presupposes that the jury works in a controlled environment, untouched by any influence other than that properly permitted by the trial judge. "This protection and safeguard must remain inviolate if trial by jury is to remain a viable aspect of our system of jurisprudence." *United States v. Harry Barfield Co.*, 359 F.2d at 124. The assumption of impartiality achieves two ends: it insures that defendants receive a fair trial and it maintains the faith of litigants in the probity of verdicts and the integrity of the system. *See Krause v. Rhodes*, 570 F.2d at 568 (quoting *United States v. Ferguson*, 486 F.2d 968, 971 (6th Cir. 1973)).

Extraneous influence on a *sitting juror* might have one or more of several results. It creates a passageway through which information may flow both into and out of the jury room. Contact might intimidate, either obliquely or directly; it might subtly create empathy; it might disclose facts of which the jury ought not to be aware.[142] Contact also might result in disclosure by a juror of confidential information about the jury deliberations, or the impressions of individual jurors. The existence of any communication link between the jury and interested parties thus potentially contaminates the controlled environment irreparably. These concerns give rise to the presumption of prejudice. Of course, the resulting degree of actual prejudice varies, depending, for example, on whether the contact is directly with a party, relates to the merits of the case, involves threats, or is communicated to other jurors. These factors no doubt are persuasive when the trial judge determines whether the presumption of prejudice is rebutted.

Contact with an *excused juror*, before the verdict is rendered, could also influence the jury. First, indirectly, such a conversation makes possible precisely the same kind of influence on jury deliberations as direct contact with a sitting juror. An excused juror could serve as a conduit of information into the jury room. Indeed, in the single case we have found involving a defendant's communication with an excused juror, the excused juror telephoned a sitting juror to recount the conversation, who then repeated what was said to other jurors. *See United States v. Boscia*, 573 F.2d 827 (3d Cir.), *cert. denied*, 436 U.S. 911 (1978). If this were the only thing to be feared, we might have some reservations about a rule that *any* discussion between an excused juror and *any third party*,

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[142] For example, in *United States v. Winkle*, 587 F.2d 705, 713-15 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979), a juror apparently found out that a co-defendant had pleaded guilty and disclosed this information to other jurors.

about the merits of the case, necessarily creates a presumption of prejudice (primarily because the likelihood of prejudice dissipates drastically); a cautionary instruction to the excused juror not to discuss the case, coupled with a judge's inherent discretion to declare a mistrial, might produce an adequate safeguard.

However, there is in fact much more to be feared. Contact between a party, his attorney, or an agent of either, and an excused juror, additionally offers parties the opportunity to learn information to which they ought not be privy. Perhaps most importantly, an excused juror might relay to parties or their counsel his or other jurors' impressions of the credibility of witnesses and the strength of evidence, thereby permitting counsel to address specific concerns with additional witnesses and different evidence. If such contacts were permitted, counsel undoubtedly would undertake detailed interrogations of excused jurors. This would enable counsel to benefit unfairly and unequally from access to information that the process quite properly denies, and thereby make a mockery of the underlying principles on which trial procedure is based. Additionally, such contact can provide a mini-voir dire, without benefit of notice, participation or a record. There is absolutely no guarantee, as there is in a proper voir dire setting, that all parties will be present, or be treated to the same information. There is no safeguard against revelation of personal attributes or concerns of jurors to which a knowledgable party might then address arguments. In other words, the integrity of the jury process does not stop at the door to the jury box or jury room. It extends equally to the controlled environment of the voir dire. We simply will not permit the parties or their counsel to circumvent the voir dire process and grill excused jurors about their knowledge of the prejudices or biases of remaining jurors.

Accordingly, we find that contact between an excused juror and a party, his counsel, or an agent of either, implicates the two concerns underlying *Mattox*—the fairness

of the trial and the overall integrity of the jury system—and similarly has the potential to prejudice the verdict. We therefore conclude that a presumption of prejudice arises from a showing that such contact has occurred. In this case, the trial judge found that the presumption was rebutted and that the contact had no prejudicial impact. We find Judge Oberdorfer's reasoning convincing and conclude that his denial of the mistrial motion constitutes a proper exercise of discretion.

Our review of the trial court's ruling on the mistrial motion is limited to assuring that the judge did not abuse his discretion.[143] In this regard, his appraisal of the prejudice resulting from contact with an excused juror is entitled to great weight, and ought not be disturbed unless it is "manifestly unreasonable," *Miller v. United States*, 403 F.2d 77, 84 n.11 (2d Cir. 1968), or unless new facts have been discovered since the ruling.

Several factors support Judge Oberdorfer's ruling of no prejudice. First, there is absolutely no evidence that any sitting juror was affected by the conversation. The excused juror did not mention the conversation to any sitting juror, and no sitting juror was contacted directly. Thus, half of our concern—for information flowing into the jury's controlled environment—is relaxed. Second, the timing of the contact minimized the usefulness of any information that might have been received. Had the excused juror expressed concern about the honesty of any witness, or the probity of any evidence, plaintiffs' counsel could not have shifted strategy or shored up testimony. After each side had completed its case, it simply was too late to adjust the evidence. Third, the nature of the information relayed was not of a kind to enable counsel to address the private biases or concerns of individual jurors in closing argument. At bottom, the conversation sim-

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[143] *See Washington Times Co. v. Bonner*, 86 F.2d 836, 848 (D.C. Cir. 1936).

ply informed counsel that complex topics are complex, and that overwhelming amounts of information are overwhelming. To be sure, the excused juror focused on the difficulty of the statute of limitations issue—a proposition with which we fully agree—perhaps signaling to counsel to focus in closing argument on that issue. Yet we find it completely reasonable to conclude that counsel would otherwise have addressed in closing argument a major issue in the trial, and that defense counsel must have been prepared, and had full opportunity, to respond. In addition, since we have resolved much of the statute of limitations issue as a matter of law, we would be especially reluctant to override the trial judge and find that the conversation prejudiced the verdict as a matter of law.

In light of all of the foregoing, we affirm the ruling below on the jury contact question.

VI. *Sufficiency of the Evidence*

All defendants argue that the evidence at trial supports neither a finding of conspiratorial nor of individual liability against any of them.[144] They concede that the jury

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[144] Defendants challenge a host of evidentiary rulings by the trial court, principally focusing on the admission of testimony and exhibits about FBI activities that did not expressly pertain to a named defendant. Judge Oberdorfer addressed most of these arguments at length in the post-verdict opinion denying defendants' motion for judgment notwithstanding the verdict. *Hobson*, 556 F. Supp. at 1181-84. We have thoroughly reviewed the relevant portions of the record, the arguments put forth by defendants, and the District Court opinion, and conclude that the challenged evidentiary rulings are not in error. We are wholly persuaded by Judge Oberdorfer's analysis as to those rulings challenged in the motion after the verdict. At the same time, we find no merit to defendants' conclusory assertions that the admission of certain other evidence, not challenged in the post-verdict motion, was improper.

The District defendants assert in a footnote that the District Court erroneously admitted statements of former MPD

was properly instructed to consider whether each defendant had, by individual conduct, injured each plaintiff, and that it found as much on the special verdict form. They also do not challenge the court's instructions on the elements of a conspiracy or conspiratorial liability. Instead, they contend that the evidence did not support sending the case to the jury.

Defendants unsuccessfully raised this argument before the District Court, in motions for a judgment notwithstanding the verdict. Our task at this stage is limited. In reviewing the ruling of the District Court, we must view all evidence, and inferences to be drawn therefrom, in the light most favorable to plaintiffs. *See Alden v. Providence Hospital*, 382 F.2d 163, 165 (D.C. Cir. 1967), *quoted in Doe v. District of Columbia*, 701 F.2d 948, 965 (D.C. Cir. 1983) (Edwards, J.) (separate concurring statement). Moreover, unless we "determine that 'no reasonable man could reach a verdict in favor of' the prevailing party, the jury's verdict must be allowed to stand." *Doe*, 701 F.2d at 965 (quoting *Muldrow v. Daly*, 329 F.2d 886, 888 (D.C. Cir. 1964)) (separate concurring statement). If reasonable persons could even disagree about the sufficiency of the evidence, we must uphold the judgment.

Stripped to its essentials, plaintiffs' claim is that defendants undertook an array of activities for the unlawful purpose of disrupting and impeding plaintiffs' lawful and peaceful efforts to protest Government policies. Defendants argue that individually each activity was a proper exercise of law enforcement authority. The gravamen of plaintiffs' response is that it is immaterial here that certain of defendants' activities were for law enforcement purposes because, simultaneously with these al-

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officers. Brief of District Defendants, p. 59 n.70. We have no idea whether the footnote is intended as a separate argument. In light of our disposition on the merits, it is unnecessary for us to determine whether the point raised by the District has been properly presented for our review.

legedly legitimate activities, defendants undertook a massive scheme for the express purpose of disrupting and defeating plaintiffs' exercise of protected rights. In short, plaintiffs forcefully contend that it is a sham for defendants to plead that their activities were merely innocent efforts to obtain information for law enforcement authorities. As a general proposition, we agree with plaintiffs' assertion that defendants have, in some important respects, badly mischaracterized the evidence submitted to the jury.

Proof of the defendants' unlawful purposes was offered in a variety of forms, including documents expressly articulating the COINTELPRO design, and testimony about incidents that could not have been designed simply to gather information or otherwise engage in lawful actions. Thus, in some instances activities that might appear proper—such as interviews of demonstrators—are alleged to have been improper because they were performed with an intent to intimidate, not to gather information. In reviewing the evidence, we fully recognize that we must be chary not to impute unconstitutional motive where none is to be found, and, in particular, not to permit any defendant to be penalized for engaging in legitimate law enforcement activity. At the same time, we must recognize that, in the presence of competent evidence, it was for the jury to decide the motive or intent with which actions were taken.

The foregoing principles do not, of course, require us to uphold a jury's decisions in the absence of any evidence that might reasonably support its findings. In this case, our review of the trial transcripts and the evidentiary submissions, coupled with the parties' extremely helpful briefs on these points, lead us to conclude that the evidence cannot support all aspects of the jury's verdict. In particular, we find insufficient evidence that either the named, individual MPD defendants or the District of Columbia participated in a conspiracy to violate plaintiffs'

constitutional rights either within MPD or between persons in MPD and the FBI, and we reverse judgments against those defendants arising from those two alleged conspiracies. We also find insufficient evidence supporting the individual liability of the District or any MPD officer to any plaintiff and reverse the individual liability judgments against the District and each MPD defendant. Similarly, we find insufficient evidence that the FBI defendants participated in any conspiracy with persons in MPD and reverse those findings. The District Judge's ruling on all other findings by the jury—as to the individual and conspiratorial liability of the FBI officers—is affirmed.

A. *The Conspiracies*

The jury found each defendant to have participated in one or more civil conspiracies designed to deprive plaintiffs of their First Amendment rights by disrupting their organizations and impeding their associations with other persons. One conspiracy was alleged to exist within MPD, a second was alleged between MPD and the FBI, and the third allegedly existed within the FBI. We will first consider the two conspiracies involving the MPD.

A civil conspiracy is defined as an agreement between two or more people to participate in an unlawful act or a lawful act in an unlawful manner. *See Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *Hampton v. Hanrahan*, 600 F.2d 600, 620-21 (7th Cir. 1979), *modified on other grounds*, 446 U.S. 754 (1980). An express agreement among all conspirators is not necessary. "A plaintiff . . . need not prove that each participant in a conspiracy knew the 'exact limits of the illegal plan or the identity of all participants therein.'" *Hampton*, 600 F.2d at 621 (quoting *Hoffman-LaRoche, Inc v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971)). The conspirators "must share the general conspiratorial objective, but they need not know all the details of the plan . . . or possess

the same motives." *Id.* Thus, to "demonstrate the existence of a conspiratorial agreement, it simply must be shown that there was 'a single plan, the essential nature and general scope of which [were] known to each person who is to be held responsible for its consequences." *Id.* (quoting *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F.2d 872, 875 (7th Cir. 1971)). To make the conspiracy actionable, there must also be an overt act in furtherance of the object of the conspiracy that injures plaintiff in his person or property or, in a section 1985(3) action, which deprives him of having or exercising any right or privilege of a citizen of the United States.

The District defendants argue, first, that they engaged only in lawful intelligence-gathering and therefore did not agree among themselves to do an unlawful act or a lawful act by unlawful means.[145] Second, they argue, the evidence failed to demonstrate the existence of an MPD-FBI joint conspiracy.[146] Without concluding that no such conspiracies existed, we agree with defendants that there was not enough evidence for the jury to conclude that the individual MPD defendants shared the 'general conspiratorial objective" of intentionally disrupting plaintiffs' First Amendment rights, either among themselves or with the FBI. No evidence linked to any individual MPD defendant warrants even an inference of unlawful motive in carrying out routine law enforcement activity.

According to the District defendants, the record reveals only in lawful intelligence-gathering and therefore did data for law enforcement purposes, such as planning for security and crowd control at future demonstrations, by means of physicial surveillance and informants. This process, they explain, not only is lawful, but also was recommended by the Kerner Commission as a means to

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[145] Brief of District Appellants, pp. 60-61.

[146] *Id.* at 62-66.

anticipate and prepare for civil disorder.[147] In addition, they concede, they occasionally obtained intelligence by electronic surveillance. We do not agree, and MPD does not seriously argue,[148] that the record is devoid of evidence that any District officers engaged in activities disruptive of the plaintiffs' activities protected by the First Amendment. We put aside such evidence for the moment, however, because we agree with the District that no evidence indicates any individual MPD defendant initiated or approved these actions. We turn our attention instead to evidence of the activities in which the individuals engaged.

Our review of the record leads us to the conclusion that the individual activities of the MPD defendants were in all relevant respects[149] consistent with the recommendations of the Kerner Commission and other law enforcement task forces, and did not support an inference of their participation in an unlawful conspiracy. The task forces either suggested or endorsed the framework by which the MPD defendants operated—from the establishment of the Intelligence Division as it existed in the relevant time period, to the information-gathering procedures it utilized, to the exchange of information with other law enforcement agencies. For example, the Kerner Commis-

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[147] The reference is to the National Advisory Commission on Civil Disorders, which issued a report on March 1, 1968. The Commission, chaired by Illinois Governor Otto Kerner, was established in July 1967 by President Johnson following an outbreak of civil disorder around the country. *See* Report of the National Advisory Commission on Civil Disorders, March 1, 1968 [hereinafter Kerner Commission Report].

[148] *See* Brief of District Appellants, pp. 58-59 (detailing five incidents that could be considered disruptive) ; these incidents are discussed in text, *infra*.

[149] Suggestions that defendants might have engaged in unlawful wiretaps are not relevant to whether they acted with an intent to impede plaintiffs' *First Amendment* rights. If proven, such actions of course might be deemed illegal, but on other grounds not relevant to our review.

sion reported on the "absence of accurate information both before and during a disorder" and recommended that police departments develop means to obtain adequate intelligence for planning purposes:

> An intelligence unit staffed with full-time personnel should be established to gather, evaluate, analyze, and disseminate information on potential as well as actual civil disorders. It should provide police administrators and commanders with reliable information essential for assessment and decisionmaking. It should use undercover police personnel and informants, but it should also draw on community leaders, agencies, and organizations in the ghetto.

Kerner Commission Report, note 147, *supra*, at 269. Plaintiffs' response is to detail evidence of incidents in which informants acted as agents provocateurs, but without linking the enumerated disruptive activities to any *individual defendant*. Nor is plaintiffs' response surprising: the record simply lacks any evidence that the MPD defendants participated in, or knew about any conspiracy *to disrupt*, as opposed to a conspiracy to learn about plaintiffs' protest activities.[150] We decline to hold that the individual defendants' positions in the MPD hierarchy alone permit an inference that each named defendant knew about and set in motion the disruptive activities of other MPD officers.

We are equally at a loss to find any evidence that the MPD defendants engaged in a conspiracy with the FBI to infringe plaintiffs' rights. To be sure, as plaintiffs argue, "[e]vidence of a pattern of mutually supportive activity over a period of time provides a reasonable basis for inferring that the parties are engaged in a common

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[150] We note evidence that MPD officers instructed an informant, Charles Marcum, to break into a peace group's office at night and steal a metal strong box in an effort to gather information. Whatever the lawfulness of such activity, it simply does not permit an inference that any individual's aim was to inhibit plaintiffs' exercise of their First Amendment rights.

pursuit." [151] However, when the *only* evidence of such "mutually supportive activity" is conversation and the exchange of intelligence information—a form of cooperation expressly endorsed by presidential task forces at the time [152]—it simply is not reasonable to infer unlawful activity. Absent some evidence that the individual MPD defendants knew about COINTELPRO,[153] or engaged in

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[151] Brief of Appellees, p. 43 (citing *Halberstam v. Welch*, 705 F.2d at 81; *Hampton*, 600 F.2d at 624).

[152] *See, e.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 119-23 (1967) (recommending advance planning for civil disorder between local and federal law enforcement agencies); REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 202-03 (1966) (recommending support for MPD efforts to increase liaison with other police agencies rendering law enforcement service in the District).

[153] The FBI engaged in extraordinary efforts to prevent persons outside the FBI from learning about COINTELPRO. Both MPD and FBI witnesses at trial repeatedly denied that MPD knew about the program. *See, e.g.*, III J.A. 1171 (testimony of Charles Brennan) (denying FBI worked with local police in carrying out goals of COINTELPRO-New Left); III J.A. 1343-49 (testimony of Jerry Wilson) (testifying that he was not aware of what the FBI was doing, that MPD was not involved in quelling political dissent). The Senate Report, note 8, *supra*, details FBI efforts to keep COINTELPRO inside the Bureau, as do other documents introduced at trial. *See, e.g.*, Senate Report, note 8, *supra*, at 146-52 (no indication that FBI informed Attorney General of full scope of COINTELPRO activities); IV J.A. 1728 (FBI memorandum cautioning that program must not be known outside the Bureau). Another book of the Senate Report sums up the situation as follows:

> There is no clear answer to the question whether anyone outside the Bureau knew about COINTELPRO. One of the hallmarks of COINTELPRO was its secrecy. No one outside the Bureau was to know it existed. A characteristic instruction appeared in the Black Nationalist originating letter:
>
> > You are also cautioned that the nature of this new endeavor is such that under no circumstances

disruptive activities on their own to complement those of the FBI, or in any other way violative of First Amendment rights went beyond the limits of proper intelligence-gathering, we cannot permit an inference of unlawful motive.[154] We therefore conclude that individual MPD defendants could not reasonably have been found to know of, or participate in, an unlawful scheme along with the FBI.

Evidence of disruptive activity by persons other than the individual defendants is present, however, and requires us to consider whether a jury reasonably might

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should the existence of the program be made known outside the Bureau and appropriate within-office security should be afforded to sensitive operations and techniques considered under the program.

Thus, for example, anonymous letters had to be written on commercially purchased stationery, newsmen had to be so completely trustworthy that they were guaranteed not to reveal the Bureau's interest; and inquiries of law enforcement officials had to be under investigative pretext. In approving or denying any proposal, the primary consideration was preventing "embarrassment to the Bureau." Embarrassment is a term of art. It means both public relations embarrassment—criticism—and any revelation of the Bureau's investigative interest to the subject, which may then be expected to take countermeasures.

SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. No. 755, Book III (Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans), 94th Cong., 2d Sess. 64 (1976) (footnotes omitted).

[154] Indeed, several courts have recognized the propriety of such exchanges of information. *See Jabara v. Webster*, 691 F.2d 272, 278-79 (6th Cir. 1982) (lawfully obtained information may properly be given to another Government agency), *cert. denied*, 104 S. Ct. 193 (1983); *Philadelphia Yearly Meeting of Religious Society of Friends v. Tate*, 519 F.2d 1335, 1338 (3d Cir. 1975) (mere existence of police intelligence-gathering and sharing of information collected is not actionable); *Donohue v. Duling*, 465 F.2d 196, 219 (4th Cir. 1972); *ACLU v. Laird*, 463 F.2d 499, 502 (7th Cir. 1972), *cert. denied*, 409 U.S. 1116 (1973).

infer that the District participated either in an internal MPD conspiracy or in one with the FBI. As to the latter, we must decide whether the flow of information back and forth, coupled with evidence of efforts to impede plaintiffs' rights, permits an inference that the District and unnamed defendants worked with the FBI toward a common goal, even if the communication on its own does not suffice. Evidence of such disruptive practices includes the following:

—MPD undercover informer Ann Kolego Markovich infiltrated the Antiwar Union, an antiwar group that worked with the Peoples Coalition for Peace and Justice, another antiwar group with which Mr. Pollock was affiliated. According to the evidence, Kolego Markovich acted as an agent provocateur and urged others to commit violent acts during meetings and demonstrations planned by the Antiwar Union and the PCPJ. *See* II J.A. 789-94 (testimony of Carol Cullum); II J.A. 752-53 (testimony of Richard Pollock). At trial, Kolego Markovich denied this activity; the jury found that she was liable on the merits in some instances but that claims against her were barred by the statute of limitations.

—At an ECTC demonstration planned by plaintiffs Abbott and Booker, a demonstrator urged the crowd to disregard instructions given by Mr. Abbott—whom the demonstrator called a "sell-out artist, phony, coward"—and march to an off-limits area where police were waiting. About 200 people did so, resulting in numerous arrests. Mr. Abbott later found out that the demonstrator was Jan Francis, an MPD officer. *See* II J.A. 804-06 (testimony of Reginald Booker); II J.A. 910-14 (testimony of Sammie Abbott).

—Immediately before a major demonstration, MPD informers were told to smash the duplicating equipment of peace groups to render it inoperable. *See* III J.A. 1393-94 (transcript of MPD hearings).

—The day before another rally, a New Mobe office worker known as Steve Wilcox wrote two bad checks to the telephone company; thereafter he disappeared. As a result, Mr. Bloom and his colleagues had to scramble to raise enough cash to cover the phone bills and avoid disruption of telephone service. *See* II J.A. 721-29 (testimony of Helen Anne Gurewitz); II J.A. 696-98 (testimony of Abe Bloom). All defendants denied that Mr. Wilcox worked for the FBI or MPD.

These and other like incidents conceivably could have sufficed to permit a jury to infer that an agreement existed among certain persons within MPD to disrupt plaintiffs' activities—although not that any defendant knew about or participated in it. When different people shown to be in contact with one another act at different times in a similar and facially illegitimate manner, an inference of prior agreement might be quite plausible. *See Halberstam*, 705 F.2d at 481 ("[M]utually supportive activity by parties in contact with one another over a long period suggests a common plan."). However, these scattered events surely do not permit an inference that an official policy, custom, ordinance, regulation or decision of the municipality caused such incidents, as is required to hold a municipality liable under the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). There is no indication that the municipality impliedly or tacitly approved, authorized or encouraged such conduct by its employees, *see Turpin v. Mailet*, 619 F.2d 196, 201 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980), or that any person of sufficient seniority that his or her "edicts or acts may fairly be said to represent official policy," *Monell*, 436 U.S. at 694, ordered such activities. Plaintiffs have failed to tie the incidents described above either to an official District policy, to an unofficial governmental "custom," or to any official with policy-making authority, *see Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983). Indeed, we have found those supervisory MPD officers whom plaintiffs have identified not to have been shown to have participated in any con-

spiracy. We thus are left with a handful of scattered incidents, occurring over a period of years, aimed at a wide array of persons, which are allegedly attributable to low-level MPD officers and informants. From such scant evidence, neither an inference of official policy nor unofficial custom is warranted.

Similarly, exchanges of information and constant communication between particular persons within MPD and the FBI, coupled with patterns of similar activity on their part, might have sufficed to permit an inference of a joint conspiracy—although, again, not that any defendant knew about or participated in it. After considering several civil conspiracy cases, we recently observed that "since in most cases the court will have to infer a conspiracy from indirect evidence, it must initially look to see if the alleged joint tortfeasors are pursuing the same goal—although performing different functions—and are in contact with one another." *Halberstam*, 705 F.2d at 481 (construing *Davidson v. Simmons*, 203 Neb. 804, 280 N.W.2d 645 (1979), and *Peterson v. Cruickshank*, 144 Cal. App. 2d 148, 300 P.2d 915 (1956)). But, again, even if such activities occurred among some District employees, that fact does not permit an inference that they were taken pursuant to a District policy. We therefore conclude that the evidence simply did not suffice to permit the jury to conclude that the District participated in any conspiracy that might have existed within the MPD, or between certain persons in MPD and the FBI.

The FBI conspiracy need not detain us. There was evidence that each FBI defendant knew about, and actively participated in unlawful COINTELPRO activities. *See* Discussion section VI(B), *infra*. The essence of a civil conspiracy is participation in a common and unlawful plan whose goals are known to all members—even if all parties are not privy to each individual act taken in furtherance of the scheme. The evidence here undoubtedly sufficed to permit the jury to conclude that such a con-

spiracy existed within the FBI, and that the FBI defendants were participants in it. At the same time, we find insufficient evidence that these defendants participated in any conspiracy with persons in MPD and reverse judgments against them arising out of that alleged joint MPD-FBI scheme.

B. *Individual Liability*

The foregoing discussion leads inexorably to the conclusion that the individual MPD defendants and the District were entitled to a directed verdict on plaintiffs' *Bivens* claims. The dearth of evidence that *any* one of them took *any* act with the intent to impede *any* plaintiff's exercise of rights protected by the First Amendment precludes a finding of individual liability. There simply is no evidence from which a jury reasonably could infer that any one of them was responsible for deprivation of a plaintiff's First Amendment rights. In the same way, the evidence of disruptive practices in which various MPD informants engaged does not allow an inference that the District, through its policies, acted to disrupt plaintiffs' rights.

The verdicts against the individual FBI defendants are supported by the evidence. In so saying, we recognize that the record reflects extraordinary variety in the level of participation of each defendant: whereas some defendants actively participated in formulating and carrying out some of the most blatantly wrongful activities, such as the "Give Them Bananas!" leaflet, others are implicated only by inference. While we have no doubt that circumstantial evidence and inference can support a jury verdict, we caution that damage awards must reflect disparities in responsibility among the defendants.

Plaintiffs' least substantial case against an FBI agent is that against Mr. Pangburn. We have carefully scanned the record and conclude that it supports a finding that he acted to injure plaintiffs. Throughout the relevant period, Mr. Pangburn was involved in WFO investigations

of racial extremists. He knew about COINTELPRO, and in particular about COINTELPRO-Black Nationalist, and was well aware that its aim was to devise procedures to make extremist groups less effective. More specifically, defendant Pangburn admitted that he investigated the BUF, *see* Tr. Trans. (Dec. 10, 1981), Vol. 5, at 425, and Julius Hobson, *id.* at 435, and that he received information about reaction to a BUF demand for $25,000 from the New Mobe. *Id.* at 437. Finally, when questioned about an FBI document indicating that WFO was told to instruct its agents in BUF to take opposing positions on the issue of the head tax, he acknowledged both that he probably had informants in BUF at the relevant time and that he would have been involved in instructing them, if they were to be instructed. *Id.* at 444-45 (testimony regarding Plaintiffs' Ex. 19, IV J.A. 1830-31). On the basis of the foregoing, we conclude that a jury reasonably might conclude that defendant Pangburn knew about FBI efforts to disrupt plaintiffs and took steps to implement the agency's plan to injure plaintiffs. At a minimum, the jury reasonably could have found that defendant Pangburn acted to exacerbate the head tax issue through his BUF informants. Moreover, the evidence permitted an inference that he knew about other COINTELPRO programs directed against BUF and other Black groups and was positioned to help effectuate them. As to his liability to plaintiffs who were not directly involved in BUF, or other "racial extremist" groups with which Mr. Pangburn was concerned, we agree with Judge Oberdorfer that those verdicts were supported by evidence.[155]

Each of the other FBI defendants was well positioned to create and effectuate individual COINTELPRO activities, and the evidence supports the conclusion that each took steps to disrupt these plaintiffs' rights. For example, defendant Jones acknowledged that he was in the position to approve or disapprove suggestions from the

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[155] *Hobson*, 556 F. Supp. at 1171-72.

WFO, that he approved preparation of The Rational Observer [156] and other COINTELPRO activities, and that it was part of his job to make sure that Bureau directives on implementation of both COINTELPROs were carried out. III J.A. 1153-55, 1467-68, 1470. Defendant Grimaldi prepared a memorandum to headquarters seeking permission to acquire WMC housing forms to fill in with fictitious addresses, *see* IV J.A. 1818-22, reported success in interfering with counterinaugural demonstration marshals' walkie-talkie radio communications, thereby countermanding the marshals' orders and disrupting the NMC, *see* IV J.A. 1823-26, and conceived of and published The Rational Observer. *See also* II J.A. 968-70, 974-75 (testimony of Mr. Grimaldi). Defendants Brennan and Moore of course knew about the COINTELPROs —an intra-agency memorandum announcing the New Left activities went out over Mr. Brennan's name, IV J.A. 1742, and a memorandum announcing the Black Nationalist activities went out over Mr. Moore's name, IV J.A. 1729—and they remained involved throughout the programs' tenure. Their positions in headquarters clearly permitted an inference that directives from headquarters either were formulated or approved by them, and supervised by them, and that activities that went forward were not disapproved by them. Moreover, their signatures, initials or names on numerous documents confirm that they

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[156] Defendants suggest that publication of The Rational Observer could not constitute unlawful activity under any circumstances. We believe publication of a newspaper, under Government auspices, with its true author misrepresented, which cautions peace demonstrators that they might be embarrassed later in life for their present activities, and which urges students to seek an injunction against publication of another newspaper, is unlawful, at least in the context of an organized scheme using legitimate and illegitimate means to thwart the activities of a political group. This inference is particularly supportable in light of the FBI memorandum boasting that The Rational Observer had successfully produced precisely that result. IV J.A. 1861-62.

knew of, sometimes expressly endorsed, and did not put a halt to activities relevant to plaintiffs. *See, e.g.*, IV J.A. 1848 (memorandum from FBI headquarters giving permission to prepare the "Give Them Bananas!" leaflet, with copy to Mr. Moore, handwritten initials of Mr. Brennan); III J.A. 1198-1200 (testimony of Mr. Brennan regarding The Rational Observer); IV J.A. 1810-17 (memorandum issued over Mr. Moore's name suggesting covert distribution of press releases to cooperative news sources to curtail fundraising efforts for planned civil rights demonstration); II J.A. 1086-98 (testimony of Mr. Moore on same subject).

The foregoing is hardly an exhaustive list of each defendants' COINTELPRO activities. We offer this brief sketch simply to demonstrate that the record does not lack evidence from which the jury reasonably could have concluded as it did regarding each FBI defendant. We therefore affirm the remaining judgments against them.

VII. *Damages*

Our disposition of the liability issues poses an obstacle to the immediate resolution of all damage awards and requires that we remand this case for further proceedings. In so doing, we observe that this case serves as a pristine example of the extraordinary usefulness of special verdicts, particularly in complex cases. Here the jury responded to particular questions about MPD, MPD-FBI and FBI conspiratorial liability, as well as individual liability, and its specific decisions regarding the conspiratorial and individual liability of the FBI defendants are in no way affected by our conclusion concerning the liability of the District defendants. In marked contrast, the special verdicts requested only generalized findings of damages of each defendant as to each plaintiff.[157] We

[157] The jury found the five FBI defendants liable to each plaintiff in the following amounts: Brennan—$9,375; Moore

therefore are unable to determine what portion of the damages assessed against the FBI defendants is properly attributable to their individual acts, or their participation in the FBI conspiracy, and what part was levied as a result of their alleged participation in the FBI-MPD conspiracy, of which we have found insufficient evidence to sustain a judgment. It is worthwhile to note that, had the same particularized special verdicts been returned both as to damages and liability, both our task, and that of the parties and the District Court on remand, would have been greatly facilitated. In that instance, we might have been able to limit our review to questions concerning the excessiveness of the damage awards.[158] Had we found them to be excessive, we might have remanded for a proposal of remittitur or, if plaintiffs did not consent, for a new trial on damages.[159] Without the guidance of special

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—$7,500; Jones—$5,625; Grimaldi—$4,687.50; Pangburn—$5,625. Two-thirds of each award represented compensatory damages, and one-third was in punitive damages. MPD defendants Wilson and Herlihy were found liable to each plaintiff for compensatory damages in the following amounts: Wilson—$3,750; Herlihy—$3,125. The five other MPD officers were found liable only in compensatory damages and solely to plaintiffs Abbott, Bloom, WPC, Pollock and Waskow, in the following amounts: Acree—$2,562.50; Scrapper—$3,125; Jagen—$2,562.50; Suter—$2,562.50; Mahaney—$1,875. The District of Columbia was found liable to each plaintiff in the amount of $37,937.50. The damage awards against the District defendants are, of course, vacated in light of our rulings on their liability.

[158] Defendants do not challenge the court's jury instructions on damages, but rather the court's analysis on the excessiveness of the verdict.

[159] Existing case law establishes that when a jury's award exceeds the bounds of any reasonable recovery, the Court of Appeals may either suggest a remittitur or remand to the District Court with directions to do so. *See Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 784-86 (5th Cir. 1983) (conditioning affirmance of jury verdict on prevailing party's ac-

verdicts, our options at this stage are necessarily more limited, and as to all but one plaintiff on one claim, we are able only to remand for a new trial on damages.

The single exception is plaintiff David Eaton, in his claim against Gerald Grimaldi. The jury found that Mr. Grimaldi participated in an FBI conspiracy against Mr. Eaton, and individually injured Mr. Eaton, but that he did not participate in a joint FBI-MPD conspiracy against Mr. Eaton. *See* I J.A. 379. It concluded that Mr. Grimaldi was liable to Mr. Eaton for $4,687.50, of which two-thirds, or $3,125.00, represented compensatory damages, and the remainder, $1,562.50, punitive damages. I J.A. 382. As to this one award, we therefore consider the FBI defendants' claims that the damage judgments were excessive in light of the evidence.

The FBI defendants' challenge is two-fold: they assert that plaintiffs suffered no actual injury warranting com-

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ceptance of remittitur established by appeals court); *J & J Farms, Inc. v. Cargill, Inc.*, 693 F.2d 830, 836-37 (8th Cir. 1982) (remanding for remittitur in specified amount); *Howell v. Marmpegaso Compania Naviera*, 536 F.2d 1032, 1034-35 (5th Cir. 1976) (remanding to trial court to set remittitur amount, because trial court is better able to review record and determine proper figure); *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir.) (observing that reviewing court may order a remittitur or a new trial when award is contrary to all reason), *cert. denied*, 396 U.S. 835 (1969); *Diapulse Corp. v. Birtcher Corp.*, 362 F.2d 736, 744 (2d Cir.) (same), *cert. dismissed*, 385 U.S. 801 (1966). While reviewing courts are empowered to set the amount of remittitur, *see McDonald v. Bennett*, 679 F.2d 415, 416 (5th Cir. 1982), and, where the proper amount is beyond dispute, often do so, *see Kropp v. Ziebarth*, 601 F.2d 1348, 1355 (8th Cir. 1979) (remanding with directions to enter remittitur of specified amount, or, if it is not accepted, a new trial), it is not unusual to remand with directions to the trial court to set the amount, *see Glazer v. Glazer*, 374 F.2d 390, 413-14 (5th Cir.), *cert. denied*, 389 U.S. 831 (1967), particularly in a case such as this one, involving a lengthy trial, numerous witnesses, and a voluminous record.

pensation, and that the awards are excessive in any event. Judge Oberdorfer rejected the first argument in his opinion denying defendants' motion for a new trial but, in apparent agreement with the second argument, wrote that he believed the compensatory damage liability of each defendant should be ten to twenty percent of the amount the jury awarded. *Hobson*, 556 F. Supp. at 1192. Nevertheless, he concluded that the monetary award was not so unreasonably high as to permit a new trial or a proposal of a remittitur.[160] We agree with Judge Oberdorfer that the single compensatory award we review is excessive and conclude, contrary to his view, that it is sufficiently disproportionate to the evidence to warrant reassessment. For one, a verdict that is potentially ten times a reasonable award simply is not supportable. Moreover, the amount is out of proportion to harm that actually has been suffered.[161] In consequence, we remand this issue to

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[160] The court cited *Taylor v. Washington Terminal Co.*, 409 F.2d 145 (D.C. Cir.), *cert. denied*, 396 U.S. 835 (1969), which held that a verdict may be set aside by a trial judge only if it appears from all the evidence at trial that "the 'verdict is so unreasonably high as to result in a miscarriage of justice,' or . . . 'so inordinately large as obviously to exceed the maximum limit of a reasonable range within which the jury may operate.'" *Id.* at 148-49 (quoting *Frank v. Atlantic Greyhound Corp.*, 172 F. Supp. 190, 191 (D.D.C. 1959) and *Graling v. Reilly*, 214 F. Supp. 234, 235 (D.D.C. 1963)). *Taylor* also made clear that at the appellate level, review of the trial judge's decision whether a verdict is proper involves a more limited inquiry into whether the trial judge abused his discretion. *Id.* at 149. This review is particularly narrow when the trial court denies a new trial motion, because an appellate court owes considerable deference both to the trial court judge and to the jury. *Id.* at 148-49. However, because Judge Oberdorfer made clear his disagreement with the size of the verdict, our deference to his judgment is plainly less than it might otherwise be in a circumstance where the trial judge has no meaningful quarrel with a jury award.

[161] Our judgment is guided by *Dellums v. Powell*, in which we found an award of $7,500 to be excessive compensation for the actual loss of an opportunity to demonstrate—a loss

the District Court for a proposal of a remittitur, *see* note 159, *supra*, or, if Mr. Eaton does not consent, for a new trial on damages. The remittitur should reflect the highest amount a jury could reasonably have set, not necessarily the District Court's view of the correct award, and must be based on findings of actual injury, in accordance with principles set out in this opinion. Finally, Judge Oberdorfer found that the record supported the jury's finding that an award of punitive damages was merited in this case. We find his analysis persuasive as to the award in favor of Mr. Eaton and against Mr. Grimaldi, and uphold the award.

As to the remaining claims, we hasten to add that while we may only remand for a new trial, the parties are not so limited. As we have observed once before,

> The parties should consider whether, in the interest of efficiency and justice, First Amendment damages could be set by the trial judge on the record thus far adduced at trial.

Dellums v. Powell, 566 F.2d 167, 196 n.87 (D.C. Cir. 1977). We of course can not require the parties to agree to this resolution. We only wish to point out that much of the considerable amount of evidence and testimony offered at trial to demonstrate liability will no doubt be offered again to demonstrate that both compensatory and punitive damages are appropriate. The result will be the

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we recognized to be at the heart of the First Amendment. At the other extreme, we found in *Tatum v. Morton*, 562 F.2d 1279 (D.C. Cir. 1977) that $100 did not suffice to compensate plaintiffs for the interruption of their Quaker vigil in front of the White House. We recognize that these poles provide little guidance here, where the injury is less direct but recurring. The figures do, however, give at least some indication of the proper valuation of such direct injury, from which the District Court might extrapolate. In this regard, we caution that a plaintiff may not receive a full compensatory award from each defendant for the same injury, but only apportioned awards.

expenditure of considerable time and money simply to recreate a record that is largely before the court already.

In remanding, we are aware of the existence of considerable confusion surrounding the interests that may be compensated in constitutional tort actions. The dearth of recent case law from this Circuit concerning damages for First Amendment violations well might leave the District Court uncertain of the proper principles against which to test a jury's verdict, to set a remittitur or (if the parties agree as suggested above) to fix damages on its own. In particular, absent clarification of the specific interests that may properly be compensated, it is impossible to determine what the level of compensation should be. To provide some guidance for disposition of this case on remand, and for future cases, we set out the basic analytical framework below.

In *Carey v. Piphus*, 435 U.S. 247 (1978), the Supreme Court held that substantial compensatory damages for violations of procedural due process may be recovered only for actual injury suffered. The Court rejected the argument that plaintiffs should recover simply for the deprivation of the constitutional right, absent any injury, or that deprivations may be presumed to cause injury. Rather, the Court established that plaintiffs must demonstrate injury to secure more than a nominal recovery, and that "damage awards [must] be *limited* to sums necessary to compensate plaintiffs for actual harm." [162] At the same time, the Court made clear that plaintiffs may prevail on the merits and recover nominal damages without proof of actual injury.[163]

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[162] *See Doe v. District of Columbia*, 697 F.2d 1115, 1123 & n.16 (D.C. Cir. 1983) (enunciating this reading of *Carey* and citing cases in support).

[163] *See Carey*, 435 U.S. at 266 ("By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substan-

Carey involved a due process claim under section 1983, but its rationale—that compensation for injury underlies damage recovery—as well as its result have been extended to other constitutional rights, and to claims not based on section 1983. Thus, in *Doe v. District of Columbia*, 697 F.2d 1115 (D.C. Cir. 1983), in which we applied *Carey* to a *Bivens* action challenging prison conditions on the basis of the Eighth Amendment, we observed that the Court "meant to extend the basic 'compensation principle' to *all* constitutional rights, substantive as well as procedural." *Id.* at 1123. *Doe* therefore mandates that we apply the principles set out in *Carey* to plaintiffs' *Bivens* claims for First Amendment violations. Section 1985(3) similarly must be read in light of the principle that damages are designed to *compensate* persons for actual injuries. *Carey* expressly cited section 1985(3) as incorporating this principle, 435 U.S. at 256 n.10, and it declined to construe section 1983 differently. The language of section 1985(3) indeed supports this principle: it permits a person to recover *damages occasioned by* the deprivation of constitutional rights.[164]

Having determined that we must apply the principle of compensation to the case before us, and limit any recovery beyond nominal damages to compensation for actual injury, we must now identify the kinds of injury that might give rise to recovery. *Carey* instructs us to look first to common law tort rules of recovery for pecuniary and non-pecuniary loss. However, the common law rules

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tial damages should be awarded only to compensate actual injury. . . ."). This aspect of the Court's holding has been read to suggest that a constitutional wrong, on its own, constitutes a wrong to society as a whole, not the deprived individual. *See* Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 44 (1980).

[164] Section 1985(3) permits a person injured in his person or property or deprived of rights or privileges of United States citizens to maintain "an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

serve only as a starting point. Where the common law offers no protection to an interest analogous to that protected by a constitutional right,[165] we must adapt those rules to assure adequate compensation:

> It is not clear, however, that common-law tort rules of damages will provide a complete solution to the damages issue in every § 1983 case. In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules of damages directly to the § 1983 action. . . . In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts. . . . In those cases, the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.
>
> Although this task of adaptation will be one of some delicacy—as this case demonstrates—it must be undertaken. The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.

Id. at 258 (citations omitted). Accordingly, the Court admonishes us to tailor rules governing compensation for injuries caused by constitutional deprivation to the interests protected by the right in question, in the absence of adequate common law analogs. In so doing, our inquiry of course must not wander from the quantum of injury

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[165] That our focus is properly on interests to be protected is clear: "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254.

to protected interests into a consideration of the "inherent value" of the constitutional right.[166]

We have previously identified several interests protected by common law tort rules that might be relevant to constitutional deprivations. Persons deprived of their rights "are entitled to compensation for any physical injuries, pain and suffering, emotional distress, and impairment of their prospects for future employment proximately caused by the defendants' unconstitutional conduct." *Doe*, 697 F.2d at 1124.[167] Injury to reputation also is a compensable interest.[168] Without intimating that this list is exclusive, we believe the record before us includes some evidence of injury to three of these interests —emotional distress, reputation and earning capacity. The latter two require little elaboration.[169] The former is more complex, however, and merits some discussion.

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[166] *See Doe*, 697 F.2d at 1123 (compensation only for actual harm removes problem of jury guesswork as to value of constitutional rights in *Bivens* actions as in § 1983 cases).

[167] As we noted in *Doe*, the Court in *Carey* expressly sanctioned the award of compensation for emotional harm, as long as plaintiff provides evidence thereof. *See Carey*, 435 U.S. at 263-64 & n.20.

[168] *See, e.g., Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983); RESTATEMENT (SECOND) OF TORTS §§ 621, 623 (1979).

[169] Only one of the remaining plaintiffs appears so far to have demonstrated injury to earning capacity. Tina Hobson testified that she received a job transfer and was investigated shortly after her marriage to Julius Hobson was announced in 1969, II Tr. Trans. (Nov. 24, 1981), Vol. II, at 34-37, but did not assert a loss. We offer no judgment as to whether this information alone permits a reasonable inference of probable loss, *see Agricultural Servs. Ass'n v. Ferry-Morse Seed Co.*, 551 F.2d 1057, 1072 (6th Cir. 1977); RESTATEMENT (SEC-

The conclusory term "emotional distress" defines a jumble of intangible injuries to a person, as is well-evidenced by the facts of this case. Various plaintiffs testified that they suffered some form of "disagreeable emotion" [170] as a result of defendants' activities. Mr. Pollock, for example, testified [171] about feelings of intimidation as a result of FBI interviews and surveillance.[172] Furthermore, numerous plaintiffs were placed in stressful situations as

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OND) OF TORTS § 912 (1979) (plaintiff must establish the amount of money representing adequate compensation "with as much certainty as the nature of the tort and the circumstances permit"), or the award of more than nominal damages. We will leave it to the trial judge on remand to determine whether this or other evidence in the record would support damages for loss of earning capacity, or whether evidence presented at a new trial on the damages issue, should one be necessary, would support an award of damages for loss of earning capacity.

As to injury to reputation, it is possible that Mr. Pollock's reputation was tarnished by the aspersions cast on student activists in The Rational Observer. *See* IV J.A. 1854-62. It is also possible that plaintiffs involved in the Black United Front were harmed in their reputation in the antiwar movement by the head tax demand. This and other, similar, evidence reasonably might support a finding of injury to reputation and support a compensatory award.

[170] RESTATEMENT (SECOND) OF TORTS § 905(b) comment c (1979).

[171] II J.A. 746-50, 755-62.

[172] A 1970 document introduced at trial, from WFO to FBI headquarters, indicated that WFO had been successful, in its intensive interviews with members of the "New Left," in producing anxiety, and recommended use of that tactic elsewhere. III J.A. 1206-08. Defendant Brennan, acting assistant director of the FBI at the time, testified that he did not recall the subject matter of the document. *Id.*

a result of the aggravated head tax demand. It is the task of the jury, or the District Court, on remand to assess the testimony on these points and sort out whether each plaintiff testified to some form of distress,[173] whether the conduct directed against each plaintiff conceivably justified such distress, and whether the evidence permits a conclusion that each defendant in a *Bivens* action caused such distress. In other words, the factfinder may measure plaintiff's testimony in light of the surrounding circumstances, and in proper circumstances award damages on the basis of plaintiff's testimony.[174] In reaching its conclusion, the court or jury may consider, as elements of compensable injury for emotional distress, humiliation and personal indignity,[175] emotional pain,[176] em-

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[173] We observed in *Doe*, an Eighth Amendment case, that in appropriate circumstances the infliction of emotional distress may be inferred from the circumstances of the violation. *Doe*, 697 F.2d at 1124 n.24. We distinguished *Carey*, which had frowned on such inferences in the procedural due process context, and concluded that such inferences would more likely be reliable in the context of substantive rights, such as the Eighth Amendment. We believe that a violation of the First Amendment, like the Eighth, is inherently more likely to result in a situation that causes emotional distress than is every departure from procedural due process, and that the likelihood of distress is enhanced when the conduct is as egregious as the evidence here suggests. Accordingly, we decline to hold that some quantum of compensable emotional distress may not be inferred from the circumstances. *Cf. Phiffer v. Proud Parrot Motor Hotel, Inc.*, 648 F.2d 548, 552-53 (9th Cir. 1980) (in civil rights action claiming racial discrimination, proper to infer humiliation from circumstances); *Seaton v. Sky Realty Co.*, 491 F.2d 634, 636 (7th Cir. 1974).

[174] *See Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983) ("The jury saw the plaintiff, heard his testimony, and found him credible. His testimony in this regard was sufficient proof of his injury.").

[175] *See Baskin v. Parker*, 602 F.2d 1205, 1209 (5th Cir. 1979).

[176] *See Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983).

barrassment, fear, anxiety and anguish.[177]

In phase two of its analysis, the District Court must identify the interests protected by the First Amendment and determine whether injuries caused by the constitutional deprivation at issue will go uncompensated on the basis of traditional common law principles. *Carey*'s admonition that the common law should be modified to provide "fair compensation" suggests that intangible interests must be compensated if they can be conceptualized and if harm can be shown with sufficient certainty to avoid damages based either on pure speculation or the so-called inherent value of the rights violated. These requirements of certainty in valuation, and of actual harm, address *Carey*'s concern for jury guesswork in valuing priceless constitutional rights, while leaving open the possibility of recovery for genuine injury resulting from deprivation of those rights.

Several courts have identified First Amendment compensable rights. In *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), we held that the inability to finish speaking in a demonstration merits compensation, because the loss of an opportunity to demonstrate "constitutes loss of First Amendment rights in their most pristine and classic form." *Id.* at 195. Similarly, in *Kincaid v. Rusk*, 670 F.2d 737 (7th Cir. 1982), the Seventh Circuit held that the restriction of an inmate's access to books would be compensable if the inmate proved that "jail conditions were 'less desirable' because of the restricted access to reading material . . . or that he unsuccessfully attempted to gain access to forbidden reading materials." *Id.* at 746 (citations omitted). In the same way, we be-

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[177] *See Brule v. Southworth*, 611 F.2d 406, 411 (1st Cir. 1979); RESTATEMENT (SECOND) OF TORTS § 905 (1979).

The Restatement defines humiliation as "a feeling of degradation or inferiority or a feeling that other people will regard him with aversion or dislike." RESTATEMENT (SECOND) OF TORTS § 905 comment d (1979).

lieve competent proof that a plaintiff was deterred from attending a meeting or participating in a demonstration, as Mr. Pollock testified he was, or that associational privacy was violated, would merit "fair compensation."

Judge Oberdorfer analyzed in depth the evidence to support a damage award for such injury and concluded that it sufficed to demonstrate that plaintiffs were diverted from their protest activities by defendants' activities. *Hobson*, 556 F. Supp. at 1190. He pointed to the delay and racial distrust that affected the peace movement following the head tax episode, and to other efforts to exploit differences between the antiwar and civil rights movements. *Id.* We add to this example the evidence of confusion that followed the FBI's creation of fictitious housing forms prior to the counterinaugural demonstration in 1969, and of the FBI's efforts to disrupt a demonstration by relaying misinformation under the guise of parade marshals. To our minds, such evidence suffices to demonstrate injury to a protected interest—*i.e.*, involuntary diversion from a protected activity. However, we agree with Judge Oberdorfer that quantification of the damage arising from such activity is especially difficult; on remand, the court must bear in mind that injury that is not reasonably quantifiable is to be compensated with nominal damages.

We note, however, that many plaintiffs suggested that their rights of association were violated because the FBI's actions either deterred others from joining their movement or made the movement less effective. Proving these harms is extremely difficult, as is assessing the value of the loss. We find in the record only sparse competent evidence that other persons were dissuaded from participation in plaintiffs' activities. The only concrete example we have found is in an FBI document, from WFO to the FBI Director, outlining the "tangible results" of FBI publication of The Rational Observer. According to the document, "[a]s a result of this publication, sources

advised that students on that campus became aware of the nature of SMC and its affiliation with the YSA and partially as a result of this, refused to participate in an SMC planned demonstration on that campus." [178] Plaintiff Pollock participated in the SMC on campus and conceivably was harmed by this refusal of others to participate. We are skeptical, however, of the ability of a jury, or any person, to place a value on such a loss.[179] We need not reach the issue whether a loss of participants is ever compensable. It suffices to conclude that, in the present case, absent additional support, the impact on the SMC merits only nominal damages. Moreover, absent other competent evidence of loss of participants, plaintiffs other than Mr. Pollock may not recover even nominal damages with respect to this injury.

With the foregoing principles in mind, the District Court might find that one or more plaintiffs were entitled as a matter of law only to nominal compensatory damages, because they showed no element of compensatory injury, or because no value could reasonably be placed on the particular injury demonstrated. In that case, *Carey* instructs that the court may nonetheless award nominal damages for mere deprivation of constitutional rights. In so saying, we intimate no opinion on the proper disposition of this case on remand.

Finally, *Carey* clearly contemplates that a Court might award punitive damages in a proper case to punish vio-

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[178] *See* IV J.A. 1861-62.

[179] *See Familias Unidas v. Briscoe*, 619 F.2d 391, 402 (5th Cir. 1980) (affirming, as not clearly erroneous, District Court ruling that plaintiff suffered no compensable injury from infringement of associational rights—despite showing that Government action prompted a decline in plaintiff organization's membership; nominal damages alone would be recovered).

lations of constitutional rights.[180] Such an award surely is permissible in either a *Bivens* or section 1985(3) action when defendants are found to have acted with a malicious intent to deprive plaintiffs of their rights or do them injury, *see Carey*, 435 U.S. at 257 n.11, or with reckless or callous indifference to the federally protected rights. *See Smith v. Wade*, 103 S.Ct. 1625, 1640 (1983). Such an award may accompany either a nominal compensatory or a substantial compensatory award.

VIII. *Arguments on Cross-Appeal*

A. *Expungement of FBI Records* [181]

Plaintiffs petitioned below for an order requiring destruction of files about them that are in the custody of

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[180] *Carey*, 435 U.S. at 257 n.11. *See also Smith v. Wade*, 103 S. Ct. 1625 (1983) (punitive damages available in § 1983 action); *Carlson v. Green*, 446 U.S. 14, 22 (1980) (punitive damages are available in action directly under Eighth Amendment, partly on reasoning that such damages are available under § 1983).

[181] Plaintiffs raise three other arguments on appeal. We have considered each carefully and find that none has merit.

First, plaintiffs seek a permanent injunction prohibiting the FBI and MPD from engaging in activities of the kind at issue in this action. Judge Oberdorfer denied this request. We have reviewed his findings of fact and conclusions of law on this issue, *Hobson v. Wilson*, No. 76-1326 (D.D.C. July 22, 1982), and find no reason to disturb them.

Second, plaintiff Women Strike for Peace—the sole plaintiff as to whom the jury did not return a favorable verdict—challenges the District Court's rulings on informer and state secrets privilege. We have carefully reviewed the public affidavits and the undisclosed material and affirm the trial court's rulings.

Third, plaintiffs appear to argue that they should receive original copies of their FBI files. We agree with the District Court that this issue has been rendered moot by completion of

the FBI. Judge Oberdorfer denied the motion, principally on the ground that an outstanding order of the District Court, in a separate case, precluded the FBI from destroying the records. *See Hobson v. Wilson*, No. 76-1326, slip op. at 6 (D.D.C. July 22, 1982) (citing *American Friends Service Committee v. Webster*, No. 79-1655 (D.D.C. July 1, 1981) (H. Greene, J.)), *reprinted in* I J.A. 549. Plaintiffs renew their request on appeal, in response to which the FBI makes four arguments. Because we find none of these arguments persuasive, and believe the case to which Judge Oberdorfer refers does not preclude such an order, we remand to the District Court for reconsideration of plaintiffs' petition.

Plaintiffs argue, in essence, that the FBI's continued possession of files pertaining to them is unlawful. They point to the Privacy Act, 5 U.S.C. § 552a(e)(7) (1982), which provides that no agency shall maintain records describing how an individual exercises rights guaranteed by the First Amendment, and to 5 U.S.C. § 552a(e)(1) (1982), which provides that only such information as is relevant and necessary to accomplish a purpose of the agency shall be maintained. Records retained in violation of such prohibitions must be expunged, they assert.[182] In addition, they argue that a federal court may order expungement of records when necessary to vindicate First

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discovery and processing of plaintiffs' Freedom of Information Act claims. To the extent that they seek the files to preclude future injury resulting from FBI maintenance of the records, their claim is properly one for expungement, not possession of them.

[182] Plaintiffs variously appear to argue that the records should be destroyed or turned over to them. As we understand the current situation, plaintiffs have received all nonprivileged information in their files. We therefore take their request to be one for expungement, not further access.

Amendment rights, and that such relief is proper here. The FBI challenges both of these arguments.

First, the FBI argues that the files are necessary for purposes of this litigation. Surely that need does not stand in the way of destruction after all issues are finally resolved. The FBI admits as much,[183] and we cannot imagine any court would order expungement, if appropriate, prior to resolution of the case.

Second, the FBI cites to chapters 31 ("Records Management by Federal Agencies") and 33 ("Disposal of Records") of Title 44 of the United States Code for the proposition that it may only destroy records pursuant to the scheme set out in Title 44. The FBI asserts that under section 3101 the FBI must maintain records of its investigative activities,[184] and that destruction of records thus maintained may occur only under the terms prescribed in chapter 33 of Title 44. Section 3314 provides that procedures set out in chapter 33 are exclusive, "and records of the United States Government may not be alienated or destroyed except under this chapter." Chapter 33 establishes detailed procedures for promulgation of regulations for compiling lists of records proposed for destruction, for submission of such lists to the General Services Administration by agency heads, and for authorization from the Administrator prior to destruction. Accordingly, the FBI apparently concludes, no court may order the FBI to destroy records except pursuant to this procedure.

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[183] *See* Reply Brief of Appellants, Cross-Appellees, p. 8.

[184] 44 U.S.C. § 3101 (1976) provides:

> The head of each Federal agency shall make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities.

The flaw in the FBI's argument is that this Circuit has expressly held that chapters 31 and 33 must yield to statutory or constitutional rights elsewhere guaranteed:

> Were it necessary to protect important statutory or constitutional rights of appellee, expungement in this case would not be prevented, as the Government has argued, by the command of 44 U.S.C. § 3314 (1970) that Government records "may not be alienated or destroyed except under this chapter". Since it clearly effects no repeal of other provisions, this general statutory command must be reconciled with other statutory requirements, and must bow to them when they are more specific, as of course it must bow to the Constitution.

Chastain v. Kelley, 510 F.2d 1232, 1236 n.4 (D.C. Cir. 1975). Indeed, it is now well-established that an order for expungement of records is, in proper circumstances, a permissible remedy for an agency's violation of the Privacy Act. Two cases have expressly held this to be true when an agency has violated the Act's prohibition on maintenance of records describing an individual's exercise of rights guaranteed by the First Amendment, contained in 5 U.S.C. §§ 552a(e)(7) (1982). *See Clarkson v. Internal Revenue Service*, 678 F.2d 1368, 1376-77 (11th Cir. 1982); *Albright v. United States*, 631 F.2d 915, 921 (D.C. Cir. 1980). It is equally well-established that expungement of records is, in proper circumstances, a proper remedy in an action brought directly under the Constitution. *See Paton v. La Prade*, 524 F.2d 862 (3d Cir. 1975); *Chastain v. Kelley*, 510 F.2d at 1235; *cf. Metadure Corp. v. United States*, 490 F. Supp. 1368 (S.D.N.Y. 1980) (plaintiff may assert both Privacy Act and constitutional claims concerning agency record maintenance). Accordingly, we must reject the defendants' argument regarding the applicability of Title 44.

Third, the FBI argues that the District Court has enjoined it from destroying or otherwise disposing of its

files, and that the few exemptions to the ban against destruction "are not pertinent to the circumstances of this case."[185] We disagree. In *American Friends Service Committee v. Webster*, No. 79-1655 (D.D.C. July 1, 1981), *aff'd in relevant respects*, 720 F.2d 29 (D.C. Cir. 1983), Judge Harold Greene issued an order halting the FBI destruction of records on the ground that the FBI and the National Archives and Records Service had failed to carry out their statutory responsibility to develop records disposal schedules, in contravention of various chapters of Title 44. Judge Greene's order expressly exempted several categories of records, including Privacy Act expungement material, from the injunction. *See American Friends Service Committee v. Webster*, No. 79-1655, slip op. at 3 n.3, 11-12 (D.D.C. June 9, 1981), *reprinted in* I J.A. 511, 513, 521-22. Thus, insofar as plaintiffs' request for expungement results from a violation of the Privacy Act, the injunction would not be relevant. Moreover, particularly in light of the rationale for the injunction, we certainly do not read Judge Greene's order as barring courts from ordering the expungement of records for statutory or constitutional violations. For the very same reasons that certain record destruction is permissible outside the scope of chapters 31 and 33 of Title 44—with which the *American Friends* injunction is principally concerned—certain court-ordered expungements may be carried out during the pendency of the injunction. It would simply be inconsistent with case law in this Circuit to construe the injunction, which is narrowly directed at FBI compliance with relevant chapters of Title 44, to preclude courts from ordering expungement in circumstances that we have previously identified as not controlled by the scheme set out in Title 44.

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[185] Reply Brief of Appellants, Cross-Appellees, p. 9.

Fourth, the FBI argues that to turn over the original files to plaintiffs would nullify claims of privilege asserted in this action. This argument exemplifies a certain confusion, apparent in both parties' briefs, concerning the remedy plaintiffs seek. To the extent that plaintiffs seek complete expungement from FBI files to prevent use of the records against them at some future date, plaintiffs need not receive copies of the complete records. To the extent they wish to receive copies of the records, the issues concerning the FBI's ability to destroy them are irrelevant. We believe the latter issue—*i.e.*, plaintiffs' access to the records—has been resolved with our affirmance of the District Court's holding on privilege and need not be reconsidered. The former argument, on which we focus, is in no way affected by the claims of privilege.

In light of the foregoing, we find no merit to defendants' arguments in support of the District Court's ruling on expungement, or to the reasons offered by the District Court in its denial. We therefore remand this issue for a hearing on the merits. As we understand the posture of this case, plaintiffs seek expungement of their records under the Constitution. In such a case, "[d]etermination of the propriety of an order directing expungement involves a balancing of interests; the harm caused to an individual by the existence of any records must be weighed against the utility to the Government of their maintenance." *Paton v. La Prade*, 524 F.2d at 868; *see Chastain v. Kelley*, 510 F.2d at 1236-37 (District Court should consider "extent to which the information in the Bureau's files violates appellee's rights without serving any legitimate needs of the Bureau."). In conducting such an inquiry, a court must bear in mind the "limited relevance" of cases involving expungement of criminal records, where "the potential prejudicial effect . . . far exceed[s] that of the information here at issue." *Chastain*, 510 F.2d at 1237. While such an inquiry is well within the equitable power of the court, where necessary to vindicate rights secured by the Constitution, it may be that the court can

resolve the issue on statutory grounds without reaching the constitutional question. Once before, when confronted with a petition for expungement based on the Constitution, we based our decision ordering expungement on statutory grounds. In *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974), we granted a request for expungement based on arguments that record maintenance violated several of plaintiff's constitutional rights, on the ground that maintenance of the record was beyond the statutory authority of the agency in question. Similarly, in this case it is conceivable that the limitations of the Privacy Act, regarding maintenance of files concerning the exercise of First Amendment rights, *see* 5 U.S.C. § 552a(e)(7) (1982), will remove the need to decide "whether or to what extent the Constitution forbids the Government from contributing to the harm to the individual that may attend maintenance" of a file such as those at issue here. *Menard v. Saxbe*, 498 F.2d at 1029. Accordingly, we remand for consideration of whether the FBI's maintenance of records on plaintiffs violates the Privacy Act, and, if so, whether the violation warrants expungement in whole or part.[186] If the Privacy Act does not require the relief sought, then plaintiffs' claim based on the Constitution must be addressed.

CONCLUSION

To summarize, our judgments on this appeal are as follows:

(1) we reverse, on statute of limitations grounds, the trial judgments in favor of plaintiffs Booker, Abbott, and Bloom against the FBI defendants;

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[186] As we have previously noted, expungement is a "versatile tool: expungement of only some records, from some Government files, may be enough, as may the placing of restrictions on how the information contained in the records may be used. It is a tool which must be applied with close attention to the peculiar facts of each case." *Chastain*, 510 F.2d at 1236.

(2) we reverse, on sufficiency of the evidence grounds, the trial judgments against the individual MPD defendants and the District of Columbia;

(3) we affirm all other findings of liability against the FBI defendants (except those related to the alleged conspiracy between officials at MPD and the FBI);

(4) we remand for reconsideration of the proper amounts due as damages—specifically, in the case of Mr. Grimaldi's compensatory liability to Mr. Eaton, we remand to the District Court for a proposal of a remittitur or, if Mr. Eaton does not consent, for a new trial limited to the damages issue, and on all other claims we remand for a new trial limited to the damages issue;[187]

(5) we affirm the award of punitive damages, in favor of Mr. Eaton and against Mr. Grimaldi; and

(6) we remand for reconsideration of plaintiffs' cross-appeal regarding the expungement of the FBI records.

It is so ordered.

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[187] We emphasize that, if the parties agree, the District Court may, pursuant to the principles enunciated in this opinion, fix damages based upon the evidence adduced in the original trial record. *See Dellums v. Powell*, 566 F.2d at 196 n.87.

JULIUS HOBSON, *et al.*,

Plaintiffs,

v.

JERRY V. WILSON, *et al.*,

Defendants.

Civ. A. No. 76-1326.

United States District Court,
District of Columbia.

June 1, 1982.

MEMORANDUM

OBERDORFER, District Judge.

Plaintiffs brought this action for damages and injunctive relief against the District of Columbia and a number of active and retired members of the Metropolitan Police Department ("MPD") and the Federal Bureau of Investigation ("FBI").[1] The amended complaint filed October 28, 1977, alleged that defendants had systematically violated plaintiffs' constitutional rights, individually and through conspiracies, while plaintiffs engaged in lawful protest against government policy in the late 1960's and in the 1970's in the Washington area. Trial of the damages claim began on November 23, 1981, and continued for seventeen

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[1] Numerous defendants named in the amended complaint obtained voluntary dismissal of claims against them prior to submission of the issues to the jury. Defendants remaining in the litigation when the case was submitted to the jury are identified *infra* at 1164-1165.

days.[2] A jury of six returned verdicts, after nearly five days of deliberation, on December 23, 1981.[3] Now before the Court are motions pursuant to Fed.R.Civ.P. 50(b), 59(a) for judgment notwithstanding the verdicts or, in the alternative, for a new trial.[4]

I. Introduction

The verdicts the jury returned found most of the defendants liable to plaintiffs and awarded most of the plaintiffs substantial sums in compensatory and punitive damages. The total amount of all awards to the eight prevailing plaintiffs against the 13 defendants found liable to them was $711,937.50. Three plaintiffs recovered $81,062.50 each and five recovered $93,750 each.[5] One plaintiff, the Washington Area Women Strike for Peace ("WAWSP"), was found not to have been injured by any defendant, and consequently had no recovery.

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[2] The parties had pursued discovery for several years, during which time the case was assigned to several judges of this Court. The final trial date had been established in the Pretrial Order filed August 14, 1981.

[3] A blank copy of the special verdict form is attached as Appendix I.

[4] Consideration of the prayer for equitable relief has awaited disposition of the damages claim in the district court.

[5] The three plaintiffs recovering the lesser sum were Tina Hobson, an activist in the anti-war and civil-rights movement in Washington since 1964; David Eaton, a member of the Black United Front who protested against American involvement in the Indochina war; and Reginald Booker, a civil-rights activist who served on the Emergency Committee on the Transportation Crisis ("ECTC"), a local *ad hoc* citizens' group that *inter alia* opposed destruction of dwellings in older Washington neighborhoods to make way for new highways. The five plaintiffs recovering the greater sum were Abraham Bloom, an organizer of the Washington Area Peace Action Coalition ("WAPAC"); Arthur Waskow, a fellow of the Institute for Policy Studies ("IPS"), a Washington organization for the study of public policy; Sammie A. Abbott, an anti-war activist and ECTC organizer; Richard Pollock, a former college journalist active in anti-war organizations based in Washington, and for

(Footnote continued on next page)

The individual defendants found by the jury to be liable to one or more plaintiffs included five persons employed at FBI headquarters or the FBI Washington Field Office ("WFO"). Defendant Brennan was a section chief, and later assistant director, of the FBI's Domestic Intelligence Division from 1966 to 1971. Defendant Moore served from 1967 to 1974 as a section chief in the same division as Brennan. Defendant Jones held the post of Security Coordinating Supervisor at WFO from 1964 to 1974. Defendant Grimaldi worked as a special agent at WFO from 1968 to 1970 and defendant Pangburn held a similar position from 1968 to 1972.

The defendants employed by the District of Columbia included former MPD Chief Wilson, former Intelligence Division Inspector Herlihy, and four officers assigned to the Intelligence Division during some of the years when plaintiffs claimed to have been injured. Those officers were defendant Acree, a sergeant at the relevant time; defendant Scrapper, also a sergeant; defendant Suter, then a lieutenant; and defendant Mahaney, then a line officer. The other individual MPD defendants were three undercover officers assigned to the Intelligence Division during the relevant period: defendants Bynum, Jagen, and Markovich.

According to plaintiffs, the FBI defendants collaborated with each other, with other FBI agents, and with the MPD defendants in a variety of efforts to impede plaintiffs'

(Footnote 5 continued)

a time an office worker for the People's Coalition for Peace and Justice; and the Washington Peace Center ("WPC"), a permanent organization that seeks to redirect military spending to other uses and that participated through its membership in protests in Washington against the Viet Nam War.

Plaintiff Julius Hobson died prior to trial of the damages claim and his claims were not pursued. Plaintiff ECTC apparently discontinued prosecution of its claims prior to assignment of this case to the trial judge.

association with others for the purpose of publicly expressing opposition to government policies, chiefly opposition to the Viet Nam War and to policies espoused by national and local officials on race relations. Many of defendants' activities alleged to have injured plaintiffs were related to COINTELPRO, a then-secret FBI activity begun in 1967 and discontinued in the early 1970's. COINTELPRO had two components: COINTELPRO—New Left, which concerned activities of persons opposed to American involvement in the Viet Nam War and other related policies of the national government, and COINTELPRO—Black Nationalist, which concerned activities of persons seeking enhancement of civil rights for black persons. According to a memorandum prepared by defendant Brennan and circulated to the other FBI defendants and to agents across the country, COINTELPRO, in its "New Left" dimension, had the following objective:

> The purpose of this program is to expose, disrupt, and otherwise neutralize the activities of this group and persons connected with it. It is hoped that with this new program their violent and illegal activities may be reduced if not curtailed.

Plaintiffs' Exhibit 3. The purpose of COINTELPRO—Black Nationalist, according to an earlier memorandum, was *inter alia* to "[p]revent the coalition of militant black natioanlist groups;" the Southern Christian Leadership Conference, then headed by the Rev. Dr. Martin Luther King, Jr., was one of four "primary targets" listed in the same memorandum.[6] The memorandum that had initiated

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[6] The memorandum to the field offices announced five goals for the "Black nationalist" COINTELPRO undertaking:

> 1. Prevent the *coalition* of militant black nationalist groups . . .
>
> 2. Prevent the *rise of a "messiah"* who could unify, and electrify, the militant black nationalist movement . . .
>
> 3. Prevent *violence* on the part of black nationalist groups . . .
>
> 4. Prevent militant black nationalist groups and leaders from gaining *respectability*, by discrediting them . . .

(Footnote continued on next page)

COINTELPRO-Black Nationalist advised the agents to whom it was addressed. "You are urged to take an enthusiastic and imaginative approach to this new counterintelligence endeavor and the Bureau will be pleased to entertain any suggestions or techniques you may recommend." *See* Plaintiff's Exhibit 1. In addition to testimony there were in evidence some FBI documents indicating that COINTELPRO interfered tangibly with the protest activities of the kind carried on by plaintiffs. *See, e.g.*, Plaintiffs' Exhibit 13 (WFO reporting that FBI distribution of fictitious addresses for housing of demonstrators at 1968 Chicago demonstrations caused "numerous demonstrators" to make "useless trips to locate non-existent addresses."); Plaintiffs' Exhibit 69 ("security squad Buagents" supervised by defendant Jones instituted "an intensive interview program in the New Left community . . ." which "produced tangible results in the disruption of the day to day activities in the

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(Footnote 6 continued)

> 5. . . . [P]revent the long-range *growth* of military black nationalist organizations, especially among youth.

Plaintiffs' Exhibit 2 (emphasis in original).

The memorandum went on to instruct the field offices to develop plans for "counterintelligence action" and to submit them for approval and "field-wide" coordination. *See* Plaintiffs' Exhibit 2. As part of the program, field offices were to report, every 90 days, on "[a]ny changes in the overall black nationalist movement [including] new organizations, new leaders, and any changes in data" previously obtained by the FBI. 7Id. An earlier memorandum had similarly informed the field offices that "Black Nationalist" groups had to be watched, and the "[t]he activities of all such groups of intelligence interest to this Bureau must be followed on a continuous basis so we will be in a position to promptly take advantage of all opportunities for counterintelligence and to inspire action in instances where circumstances warrant." Plaintiffs' Exhibit 1.

See generally S.Rep. No. 94-755, Supp. Vol. 3 (Staff Report of Select Committee to Study Governmental Operations with respect to Intelligence Activities). *See also* note 12 *infra* (discussing memorandum establishing COINTELPRO—New Left).

New Left communes. . . ."). At trial, plaintiffs asserted, and the jury evidently was persuaded, that plaintiffs were victims of three conspiracies, actionable under 42 U.S.C. § 1985(3), to violate their civil rights. One such conspiracy, the jury found, included the five FBI defendants; another encompassed certain of the MPD defendants; and a third involved both FBI and MPD defendants. The jury also found that many of the defendants, acting outside the scope of any conspiracy, injured various plaintiffs in the exercise of their First-Amendment rights. The First-Amendment rights plaintiffs alleged had been violated included the opportunity to assemble for political protest, to associate with others in order to engage in political expression, and to speak on public issues, free of unreasonable government interference. Plaintiffs offered evidence of broad undertakings by defendants to disrupt their activities and of specific instances in which FBI and MPD action allegedly impeded those activities.

Only two defendants, Bynum and Markovich, were found to be not liable to any plaintiff. Having determined that the other defendants were liable on various claims, the jury awarded varying sums to the prevailing plaintiffs against those defendants. The jury found all defendants other than Markovich and Bynum liable to plaintiffs Bloom, Abbott, Pollock, Waskow, and WPC. The jury also returned verdicts for plaintiffs Hobson, Eaton, and Booker against the five FBI defendants but, among the MPD defendants, only against former Chief Wilson and former Inspector Herlihy. All defendants except the District of Columbia and MPD officer Mahaney were found to be liable for both compensatory and punitive damages.[7] The largest judgment against

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[7] In each instance in which the jury awarded punitive damages against a defendant to a particular plaintiff, the punitive award was one-half the amount of compensatory damages.

any individual defendant was that awarded against defendant Brennan, whom the jury found personally liable for $9,375 to each of the eight prevailing plaintiffs, for a total of $75,000 of which $50,000 was compensatory, and $25,000 punitive, damages. The jury returned the smallest award against defendant Mahaney, who was found liable to five plaintiffs for $1,875 each, for a total of $9,375, all compensatory. Every prevailing plaintiff recovered $37,937.50, all compensatory, from the District of Columbia.[8]

In their present motions for relief from the verdicts, the defendants found liable to various plaintiffs state numerous grounds for judgment notwithstanding the verdict ("judgment n.o.v.") and for a new trial. Defendants assert that the instructions on conspiracy and on the defense afforded by the statute of limitations were erroneous, and that even if the instructions were correct, the jury improperly found conspiratorial liability and improperly denied them relief from plaintiffs' claims under the statute of limitations. Defendants also assert that the damages awarded were excessive, and that the Court erred in not instructing the jury that the United States would not pay an award against the FBI defendants. The District of Columbia objects to the instructions on municipal liability, and, assuming *arguendo* the instructions were not erroneous, to the verdicts the jury returned against it. And all defendants also claim that the verdicts against them for conduct allegedly performed outside the scope of the alleged conspiracies similarly were not supported by the evidence. There are numerous other objections in defendants' motions.[9] Each plaintiff also has

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[8] *See* chart on p. 1188 *infra*.

[9] Defendants also assert that the Court's special verdict form was prejudicial or confusing; that the Court's rulings on admissibility of certain FBI records and documents were prejudicially erroneous; that the evidence, even if it required an instruction on punitive damages, did not support the jury's determination that they should be awarded; and

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sought judgment n.o.v. against all the other defendants as well as Bynum and Markovich.[10] For the reasons stated below, the Court will deny all motions, except the motion of defendants Wilson and Herlihy for relief from the jury's award of punitive damages.

II. The Instructions and Proof of Liability

A. Liability under 42 U.S.C. § 1985(3)

1. The Conspiracy Instructions

In their motion for a new trial the District of Columbia defendants renew their argument, first advanced at a pretrial conference and in their pretrial brief, that employees of the District cannot be liable as "persons within any State or Territory" under the terms of 42 U.S.C. § 1985(3). Defendants rest their argument on the interpretation of 42 U.S.C. § 1983 in *District of Columbia v. Carter*, 409 U.S. 418, 420-24, 93 S.Ct. 602, 604-06, 34 L.Ed.2d 613 (1973), in which the Supreme Court held that District employees did not in the course of their official duties act—for purposes of 42 U.S.C. § 1983—under color of law of "any State or territory" so as to make their conduct actionable under section 1983.[11] This action is based, however, on section 1985(3). The conspiracies that are actionable under 42 U.S.C.§ 1985(3) exist whether or not the participants act

Footnote 9 continued
that a new trial is required because the Court denied a motion for mistrial based upon defendants' discovery of an allegedly improper contact between one of plaintiffs' counsel and members of the jury Defendant Jones argues that he is entitled to relief because the Court denied various motions that would have dimissed claims against him or granted him a separate trial at a later date.

[10] There also remains a motion for sanctions against defendant Markovich for an alleged violation of the discovery obligations imposed by Fed.R.Civ.P. 37(d).

[11] Congress, in Pub.L. No. 96-170, amended section 1983 in 1979 to limit the *Carter* decision. *See* 93 Stat. 1284; [1979] U.S. Code Cong. & Admin. News 2609.

under color of any official authority. The *Carter* decision, which did not require construction of the geographical terms of section 1985(3) that are at issue here, is wholly immaterial to this case. *See District of Columbia v. Carter*, *supra*, 409 U.S. at 421-424, 93 S.Ct. at 604-06; *cf. Hurd v. Hodge*, 334 U.S. 24, 31, 68 S.Ct. 847, 851, 92 L.Ed. 1187 (1984) (construing language identical to section 1985(3) in 42 U.S.C. § 1982). *Hurd v. Hodge* controls the question here. It would indeed be anomalous if private discriminatory conduct enjoyed a geographical immunity simply because it occurred in the nation's capital. *Cf. Hurd v. Hodge*, *supra*, 334 U.S. at 31, 68 S.Ct. at 851. Accordingly, defendants' motion on this issue cannot be granted.

Defendants also assert now, as they did at trial, that there was no evidence of "class-based discriminatory animus" to justify an instruction on liability under 42 U.S.C. § 1985(3). *Griffin v. Breckenridge*, 403 U.S. 88, 96-104, 91 S.Ct. 1790, 1795-99, 29 L.Ed.2d 338 (1971), established the basic elements of conspiracies actionable under section 1985(3). The proof of a conspiracy to violate civil rights is often circumstantial, and determination of the ultimate factual questions of intent is peculiarly within the province of the jury. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 175-88, 90 S.Ct. 1598, 1617-19, 26 L.Ed.2d 142 (1970) (Black, J., concurring in the judgment). The District of Columbia defendants appear, however, to argue that it was error to instruct the jury on section 1985(3) because the alleged conspiracy was not based on racial animus. *See generally Griffin v. Breckenridge*, *supra*, 403 U.S. at 102 n. 9, 91 S.Ct. at 1798 n. 9. Passing for the moment the question whether there was sufficient evidence for the verdicts that the jury returned, it is long past dispute that section 1985(3) does not require that the targets of the conspiracy be members of a particular racial group. That principle has been clear at least since *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975). The cases now make it plain that it is the

agreement *vel non* among the alleged conspirators to single a particular group or class for discriminatory interference with constitutional rights that should itself define the class for purposes of section 1985(3). If a conspiracy actionable under section 1985(3) does exist, it will have defined for itself the group or class of persons it intends to victimize. *See Scott v. Moore*, 640 F.2d 708, 718-19 (5th Cir. 1981); *cf. Kimble v. McDuffy*, 648 F.2d 340, 346-47 (5th Cir. 1981) (en banc); *see also Canlis v. San Joaquin Sheriff's Posse Comitatus*, 641 F.2d 711, 719 n. 15 (9th Cir. 1981) (collecting cases). *See generally Hampton v. Hanrahan*, 600 F.2d 600, 624 (7th Cir. 1979), *cert. denied on these grounds, rev'd in part on other grounds*, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980). In this case plaintiffs offered, as proof of conspiratorial consensus defining the target classes, FBI memoranda launching COINTELPRO and directing agents' attention to "New Left" and "Black Nationalist" political associations, as well as testimony of participants in the FBI program.[12] Plaintiffs also examined the MPD defendants

[12] An FBI memorandum written by defendant Brennan on May 9, 1968, proposing that the Bureau establish what became COINTELPRO—New Left, described the objectives of the program in this way:

> "Our Nation is undergoing an era of disruption and violence caused to a large extent by various individuals generally connected with the New Left. Some of these activists urge revolution in America and call for the defeat of the United States in Vietnam. They continually and falsely allege police brutality and do not hesitate to utilize unlawful acts to further their so-called causes. The New Left has on many occasions viciously and scurrilously attacked the Director and the Bureau in an attempt to hamper our investigation of it and to drive us off the college campuses. With this in mind, it is our recommendation that a new Counterintelligence Program be designed to neutralize the New Left and the Key Activists. The Key Activists are those individuals who are the moving forces behind the New Left and on whom we have intensified our investigations.

Plaintiffs' Exhibit 3. *See also* Plaintiff's Exhibits 1, 2 (COINTELPRO—Black Nationalist). The significance of the COINTELPRO directives and definitions for defendants' motion for judgment notwithstanding the verdicts on the conspiracy claims is considered at pp. 1169-1170, *infra*.

on the criteria explicitly used by the Intelligence Division to identify targets for the Division's activities, and they closely questioned the MPD defendants on the implications of those criteria. There was substantial evidence from which the jury could have found that the alleged conspiracies targeted plaintiffs as opponents of the Viet Nam War or proponents of racial justice. Accordingly, the Court could not have kept plaintiff's claims of conspiracy from the jury. *See Adickes v. S.H. Kress, supra; Hampton v. Hanrahan, supra.*

Conceding *arguendo* that the conspiracy issues had to be put to the jury, the FBI defendants raise specific objections to the content of some of the conspiracy instructions. One of their objections is that the Court incorrectly defined "overt act." The Court defined "overt act" using the familiar standard instruction in the District of Columbia "Red Book."[13] As the FBI defendants correctly observe, a recovery under section 1985(3) may be had only if a plaintiff suffered an injury as a result of an act taken in furtherance of the conspiracy. *See* 42 U.S.C. § 1985(3) ("... the party so injured or deprived may have an action for the recovery of damages occasioned by such injury"); *cf. Edwards v. James Stewart & Co.*, 82 U.S.App.D.C. 123, 125, 160 F.2d 935, 937 (1947); *Fitzgerald v. Seamans*, 384 F.Supp. 688, 693 (D.D.C.1974), *rev'd on other grounds*, 180 U.S.App.D.C. 75, 553 F.2d 220 (1977). Nevertheless, proof of the agreement itself, as distinct from compensable injury, may derive from evidence of acts done by conspirators, whether or not the act caused an injury that would be actionable under section 1985(3). *See, e.g., Hampton v. Hanrahan, supra*, 600 F.2d at 624.[14] Thus when the FBI

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[13] The Court thus advised the jury, "An 'overt act' is simply any act knowingly committed by one of the conspirators, in an effort to effect or accomplish some object or purpose of the conspiracy."

[14] In this case, for example, plaintiffs offered extensive evidence of defendants' efforts to maintain secrecy regarding various FBI and MPD

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defendants contend that the Court erred in failing to instruct that "the overt act which makes the conspiracy actionable must have caused actual injury to the person, property or rights of the plaintiff," they presumably mean to assert that the Court failed to instruct the jury that an overt act in furtherance of the conspiracy must have injured the plaintiff, if that plaintiff is to have a recovery for that injury under section 1985(3).

The FBI defendants have not fairly read the Court's instructions. The Court instructed the jury that "the defendant must . . . have been proved by a preponderance of the evidence to have been a member of the conspiracy at the time the co-conspirator acted to injure the plaintiff in furtherance of his or her conspiratorial agreement."[15] Any question in the jury's mind that only acts in furtherance of the conspiracy causing injury were compensable must have been put to rest by the Court's subsequent instruction that liability would depend upon proof that "the act causing injury was committed by some one or more of [the] defendant's co-conspirators," if it had not been committed by the defendant himself. The separation of the basic definitions of the civil conspiracy from the elements of proof of liability in the instructions was merely a function of the fact that a Court's instructions, like any other exposition, can only address one point at a time. "The impact of a jury instruction 'is not to be ascertained by merely considering isolated statements, but by taking into

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(Footnote 14 continued)
operations. While that conduct would not be actionable under section 1985(3), proof of it could have assisted the jury in assessing the character of the alleged conspiracies. *See Hampton v. Hanrahan*, *supra*, 600 F.2d at 622.

[15] The verbatim transcript of most of the preceedings in this case, including instruction of the jury, has not now been filed in the record. Quotations from the instructions in this Memorandum are drawn from the Court's notes, and are believed to match the instructions given the jury.

view all the instructions given.'" *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 156-57, 87 S.Ct. 1975, 1992, 18 L.Ed.2d 1094 (1967) (*quoting Seaboard Air Line Ry. v. Padgett*, 236 U.S. 668, 672, 35 S.Ct. 481, 482, 59 L.Ed. 777 (1915)). The instructions here introduced all the major terms the jury needed to apply, including "overt act," and then led the jury through the order of proof of the various claims and defenses. No juror who followed the Court's instructions could have conscientiously returned a verdict on the conspiracy theory for a plaintiff unless the juror believed that the plaintiff had proved that he or she had been injured by an act taken by a defendant or some other co-conspirator in furtherance of the conspiracy.

Defendants' second objection to the conspiracy instructions is that the instructions permitted the jury to find a defendant liable under section 1985(3) without having found him to possess the *Breckenridge* "discriminatory animus." That objection, too, involves an implausible reading of the instructions. The instructions, incorporating the familiar principles of general civil-conspiracy doctrine,[16] explained to the jury that "the participants in a conspiracy share the same general conspiratorial objective: there exists a meeting of the minds which creates an understanding to achieve the conspiracy's objectives. Thus all participants know the common plan; each knows the conspiracy's essential nature and general scope." The instructions then defined a conspiracy actionable under section 1985(3) as one in which "the conspiracy discriminated with hostile intent against a group or class to which plaintiff belonged, with a view to singling out that groups or class" for interference with its members' rights under the Constitution.[17]

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[16] *See Hampton v. Hanrahan*, *supra*, 600 F.2d at 620-23.

[17] The relevant concept of discrimination itself was explained to the jury as an objective, on the part of the conspiracy, to single out the class or group "for interference with its rights, equal to that of the general public, to assemble or associate for political purposes."

Under those instructions, the *raison d'etre* for the conspiracy was discrimination "with hostile intent against a group or class to which plaintiff belonged," and to find a defendant liable for the conspiracy, the jury had to find that that defendant knew and agreed to the "general conspiratorial objectives." While the instructions did state that a plaintiff must prove that "*the conspiracy* discriminated with hostile intent," a person could not have been in the conspiracy, according to the instructions, unless he agreed to the "general conspiratorial objectives." The jury could not, under these instructions, have thought "the conspiracy" to be capable of some distinct "hostile intent" not shared by those who had formed the conspiracy and defined its objectives, inasmuch as a conspiracy is simply an agreement among individuals to act together in particular ways. Thus defendants' second attack on the conspiracy instructions, like the first, has no basis in a reasonable reading of the instructions.

2. The Conspiracy Proof

Defendants argue that they are entitled to judgment n.o.v. on the conspiracy issues. The evidentiary criteria for grant of judgment n.o.v. match those for grant of a directed verdict. *Murphy v. United States*, 653 F.2d 637, 640 (D.C.Cir. 1981). Neither form of relief from a determination of the facts by a jury is appropriate unless "the evidence, together with all reasonable inferences that can reasonably be drawn therefrom, is so one-sided that reasonable men could not disagree on the verdict." *Vander Zee v. Karabatsos*, 191 U.S.App.D.C. 200, 203, 589 F.2d 723, 726 (1978), *cert. denied*, 441 U.S. 962, 99 S.Ct. 2407, 60 L.Ed.2d 1066 (1979). In this case, defendants' view of the jury's verdicts, and the evidence upon which the verdicts were based, is not persuasive.

Defendants' principal argument for judgment n.o.v. is that the evidence demonstrated that they were simply law-enforcement officers performing their duties within

relatively small, closely-knit organizations: the MPD Intelligence Division, the WFO, and the FBI headquarters unit. Undoubtedly the fact that defendants were co-workers within various police and intelligence organizations would not alone establish the conspiratorial liability the jury found. *Cf. Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70-72 (2d Cir. 1976); *Rackin v. University of Pennsylvania*, 386 F.Supp. 992, 1005 (E.D.Pa. 1974). Yet is it also possible for officers belonging to the same law-enforcement unit to conspire among themselves to engage in conduct denounced by the Civil Rights Act and actionable under section 1985(3). *See Hampton v. Hanrahan, supra*, 600 F.2d at 621, 623-24; *cf. Rackin v. University of Pennsylvania, supra.*

In the present case, plaintiffs introduced substantial documentary evidence of close coordination with WFO, and between WFO and other FBI units, including headquarters, to disrupt and discredit individual and group protest activities the agents believed to be part of the "New Left" or "Black Nationalism." The evidence of that concerted activity indicated that, consistent with FBI practice, individual agents exercised considerable discretion and initiative, subject to higher authorities' approval, in planning and working together to disrupt protest activities in which plaintiffs were involved. There was also evidence of a similar pattern of activity among the MPD defendants, though the evidence concerning MPD activity was less extensive than that regarding the FBI.[18] Moreover, plaintiffs introduced evidence of regular contacts between supervisory personnel of the Intelligence Division, including some defendants, and WFO agents engaged in COINTELPRO activities. On the other hand, MPD defendants denied at

[18] According to testimony of some witnesses, the Intelligence Division operated without extensive written guidelines and without recording all its activities in written reports, and many records that did exist were destroyed in the 1970's.

trial any recollection of participation by them in any concerted illegal activities with the FBI, and all the defendants indicated that whatever they did to obstruct plaintiffs' activities was assumed by them to be specifically required by their orders from higher officials.

Passing for the moment the question whether defendants were entitled to official immunity,[19] and addressing only the character of their action as conspiracy *vel non*, the motions for judgment n.o.v. are not well-taken. The Court instructed the jury that "the fact that the individual defendants were engaged in law enforcement work in particular agencies of the F.B.I. and the police department is not, standing alone, proof of a conspiracy, nor does that fact preclude the existence of a conspiracy between some or all of them." That instruction was delivered at defendants' request. Only by impermissibly weighing the evidence could the Court now overturn the verdicts that built upon that instruction. Plaintiffs adduced documentary evidence and live testimony of wide-ranging long-term efforts by all the defendants to disrupt plaintiffs' political activities. Evidence of express agreements to violate plaintiff's constitutional rights was, predictably, absent from plaintiffs' case, for the most part. But direct evidence of an agreement to achieve a particular purpose need not be present. *Cf. Vander Zee v. Karabatsos, supra*, 191 U.S.App.D.C. at 150, 589 F.2d at 727 (contract formation); *see also Adickes v. S.H. Kress & Co., supra* (civil conspiracy).

How much a particular defendant may have known of the overall design to violate First-Amendment rights was critical to plaintiffs' case. Defendants denied knowledge of any conspiracy or scheme to disrupt lawful protests. There was evidence, including key documentary evidence, to the contrary. The scope of a defendant's knowledge of arrangements existing between other persons must often be

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[19] *See* pp. 1178-1181 *infra*.

deduced from circumstantial evidence. If the inferences the jury has drawn from that evidence are reasonable, then the verdict must stand. *Cf. Boutros v. Riggs Nat'l Bank*, 655 F.2d 1257, 1259-60 (D.C.Cir. 1981). Particularly is this so when the evidence did show without contradiction that defendants were positioned in organizations where oral and written information was required to move up and down and to and from them in a chain of command, as a matter of course. *Cf. Hampton v. Hanrahan, supra.* In light of this and similar evidence the Court cannot disturb the jury's judgment on the issue of conspiratorial liability.

B. Liability based upon non-conspiratorial conduct

Plaintiffs also alleged that individual defendants engaged in conduct proximately injuring plaintiffs that was not part of a conspiratorial design. The jury returned verdicts for most of the plaintiffs upon that theory of non-conspiratorial liability, and defendants found liable on that theory now seek judgment n.o.v.

Many of the defendants held supervisory positions within the MPD or the FBI. As supervisors they had authority to direct the conduct of other agents and line officers, informants, and so-called *agents provocateurs.* In order to be held accountable in damages for the action of a subordinate, however, the supervising officer must have so exercised his authority as to have made his own conduct a proximate cause of the injury suffered by the victim. *See Owens v. Haas*, 601 F.2d 1242, 1245-47 (2d Cir. 1979), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1980); *cf. Monell v. Department of Social Services*, 436 U.S. 658, 694 n. 58, 98 S.Ct. 2018, 2037 n. 58, 56 L.Ed.2d 611 (1978); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *Carter v. Carlson*, 144 U.S.App.D.C. 388, 393-95, 447 F.2d 358, 363-65 (1971) *rev'd on other grounds*, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed. 2d 613 (1973); *Tate v. District of Columbia*, Civil Action No. 81-846 (D.D.C., Oct. 26, 1981) (Greene, J.). The instructions so stated.

When the defendants moved for a directed verdict at the close of plaintiffs' evidence, the Court, without objection from plaintiffs, granted the motions of ten of them, most of whom were present or former MPD officers. There was evidence, however, that all of the other defendants played a role in the program of harassment and disruption outlined by plaintiffs' evidence, and the evidence of their personal involvement, beyond the scope of what could properly be considered a conspiratorial plan or agreement, was not so insubstantial that it could be taken from the jury. The evidence against the defendants left in the action after the motion for a directed verdict was in some instances largely circumstantial. Defendant Mahaney, for example, an MPD officer who coordinated activities of the undercover agents Bynum and Markovich, was found liable to some plaintiffs even though Bynum and Markovich were found not liable to the same plaintiffs. There was evidence, however, that other MPD undercover activity injured plaintiffs, and the jury could have inferred that Mahaney had a supervisory role in that other injurious acitivity. Plaintiffs' case against FBI defendant Pangburn also was to a large degree circumstantial. Pangburn was found liable to all the prevailing plaintiffs, even though he appears to have worked principally in the so-called "Racial Matters" dimension of COINTELPRO. The jury nonetheless returned verdicts against him in favor of plaintiffs with no direct involvement in Pangburn's own civil-rights target groups. But those verdicts were supported by evidence that the disruption of the civil-rights movement, and the somewhat successful effort to discourage civil-rights activists from participation in anti-war protests, impeded plaintiffs engaged in either activity from free exercise of their First-Amendment rights. The Court's task is at an end if it can discern any permissible theory of liability upon which the jury may have relied; the evidence upon which that theory may have been based need not be "strong." *Murphy v. United States, supra*, 653 F.2d at 646. The plausibility of

plaintiffs' theories of liability and the credibility of the evidence for and against those theories are ultimately the business of the trier of fact.[20] The motions for judgment n.o.v. on the jury's findings of non-conspiratorial liability cannot be granted.

C. Municipal liability

The District of Columbia, arguing that it could not have been liable on any theory to the plaintiffs, challenges the verdicts that the jury returned against it. According to defendant, the District of Columbia government "cannot be held liable under the theory of respondeat superior." Defendant's statement is undoubtedly correct. *See Monell v. Department of Social Services, supra*, 436 U.S. at 691, 98 S.Ct. at 2036. But the Court did not instruct the jury in a manner permitting recovery under *respondeat superior*. The instructions informed the jury that plaintiffs could recover damages from the District government only if an employee causing injury acted "in execution of the District's laws, policies, or customs;" those "policies or customs," as the Court explained, had to be "policies or customs that are made by its law-makers," or "policies that are generally enforced by District employees in the community with the implicit approval of the District government." Since the decisions in *Monell v. Department of Social Services, supra*, and *Owen v. City of Independence*, 445 U.S. 622, 100

[20] Defendants appear not to argue that the jury failed to distinguish between conspiratorial and non-conspiratorial liability in making its findings; defendants do, however, argue that plaintiffs recovered more than once for the same injuries and that the damages therefore are excessive. The latter problem is discussed *infra* at pp. 1188-1189. Even if defendants did argue that the jury found the same acts to be chargeable under both the conspiratorial and non-conspiratorial theories of liability, their attack would fail. There is no reason to doubt that, in finding liability on both types of theory, the jury first determined the scope of the conspiracy, and then determined whether there were any injuries caused by a defendant's conduct that was unconnected to participation in the conspiracy.

S.Ct. 1398, 63 L.Ed.2d 673 (1980), the principle of municipal liability for constitutional torts has had a firm basis.[21] There is no basis in this case for distinguishing the rules established in *Monell* and *Owen* for section 1983 municipal liability from those governing the liability of the District of Columbia in non-statutory constitutional litigation. The District's employees may be liable under a *Bivens* theory, and the rules governing their liability are generally to follow those existing under the statutory remedy. *Cf. Dellums v. Powell*, 184 U.S.App.D.C. 324, 333, 566 F.2d 216, 225 (1977), *cert. denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978). the District should be exposed to the same municipal liability, and have the benefit of the same limitations on that liability, as that attaching to other city governments.[22]

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[21] *Monell v. Department of Social Services, supra*, overruled *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), insofar as *Monroe* had held that local governments were not among the "persons" whom 42 U.S.C. § 1983 subjects to civil liability. In *Monell* the Court established that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. at 694, 98 S.Ct. at 2037. In *Owen v. City of Independence, supra*, the Supreme Court rejected a construction of section 1983 that would have allowed municipalities a qualified "good faith" immunity from liability for constitutional violations. Noting that section 1983 "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations," the Supreme Court concluded that its rule also "harmonizes well with developments in the common law," and suggested that municipal liability without "good-faith" immunity was essential to assure the "innocent individual who is harmed by an abuse of governmental authority . . . that he will be compensated for his injury." 100 S.Ct. at 1416, 1418-19.

[22] The Court of Appeals decided *Dellums v. Powell* prior to *Monell*, and expressly based the theory of municipal liability it employed on what the Court of Appeals termed "*respondeat superior*" liability predicated on the liability of various employees. While the use of classic

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Defendant does not even appear in its motion for relief from the verdicts to press the argument that its liability should be different from that existing under *Monell* because its employees were not, prior to 1979, liable under section 1983. Instead, the District argues that the "evidence adduced by plaintiffs in this suit" was simply insufficient to permit an award under the *Monell* standard. *Monell*, and the Court's instruction based upon it, created an issue of fact of whether the District employees' actions were taken with the approval of the government. Plaintiffs argued and offered evidence that use of *agents provocateurs* and other plainly illegal conduct were common in the Intelligence Division. Counsel for the District were content to rest their defense principally on an MPD General Order that blandly stated that the Intelligence Division's legitimate duties in the relevant period were to anticipate and deter unlawful disruptions within the District of Columbia. The jury was entitled to find that, despite that MPD directive, illegalities that injured plaintiffs in the exercise of their First-Amendment rights did occur, and were municipal practice, approved in the manner contemplated by the *Monell* Court. Given the record in this case, the Court cannot disturb the jury's judgment that some of the District employees' conduct was conduct executing the local government's policies and customs.

The jury found that the District government was liable for the participation of its employees in the conspiracies

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respondeat superior vicarious liability has been precluded by *Monell*, the broader significance of *Dellums* for this action remains: if the District should have been liable vicariously for the acts of its employees in *Dellums*, it follows that, in the wake of *Monell*, municipal responsibility should attach to actions of its employees that it "approved" and that injured plaintiffs in the exercise of their constitutional rights. There is simply nothing in the special status of the District of Columbia that would require—or permit—a unique rule to govern constitutional torts committed by District employees who are themselves liable on a *Bivens* rationale. *See* 184 U.S.App.D.C. at 332-33, 566 F.2d at 224-25.

plaintiffs proved to have existed within the MPD and between MPD and FBI personnel. The Court could not, in view of the decision in *Owens v. Haas*, 601 F.2d 1242, 1247 (2d Cir. 1979), *cert. denied*, 444 U.S. 980, 100 S.Ct. 483, 62 L.Ed.2d 407 (1980), have withdrawn the issue of municipal conspiratorial liability from the jury on the theory that the District government is not a "person." Moreover, defendant has, at no stage of this litigation, objected to the instructions as impermissibly permitting a verdict of conspiratorial liability against itself because it is not a "person" within the meaning of 42 U.S.C. § 1985(3). Corporation Counsel's argument regarding the applicability of section 1985(3) to the District government was limited to the question, discussed at pp. 1166-1167 *supra*, of whether the District falls within the geographical terms of the statute that makes actionable certain conduct within "any state or territory." Defendant made no attempt to disturb the Court's decision to rely on the holding in *Owens v. Haas* that a municipal corporation is a "person" for purposes of 42 U.S.C. § 1985(3); indeed, Corporation Counsel did not cite *Owens v. Haas* on any question related to section 1985(3). To open this issue at this late stage of this protracted case would be contrary to considerations of fair and orderly trial administration. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 2754 n. 11, 69 L.Ed.2d 616 (1981). *See generally Monell v. Department of Social Services, supra* (municipal corporation a "person" within meaning of 42 U.S.C. § 1983); *but cf. Owen v. City of Independence, supra* (municipal corporation incapable of satisfying prerequisites for "good faith" immunity).

III. The Statute of Limitations

In September 1981 the FBI defendants sought judgment on the pleadings based upon the statute of limitations. Plaintiffs, the FBI defendants claimed, had failed to commence suit upon their rights of action within three years from the time those rights accrued, and the longest statute

of limitations that might apply to the claims in this case was three years. Plaintiffs replied to defendants' motion by seeking benefit of the doctrine of fraudulent or deliberate concealment. Plaintiffs alleged that the FBI and MPD defendants had deliberately concealed their program of disruption in the late 1960's and early 1970's from the public and from plaintiffs, and that consequently plaintiffs could not, through the exercise of due diligence, have learned the material facts necessary to commence the lawsuit within three years of the injuries they suffered. Defendants, however, offered in support of their motion newspaper and magazine articles from the early 1970's that, according to defendants, should have provided plaintiffs with the material facts needed for commencment of suit; defendants also offered statements by various plaintiffs at depositions that they knew someone was either observing their activities or harassing them, and that they had, an early as 1968, considered suing government officials in response. Plaintiffs opposed the motion for judgment on the pleadings with evidence that the FBI and MPD had attempted to maintain strict secrecy about COINTELPRO and the MPD's anti-protest activities. Not until 1976, they argued, after the hearings of the Church Committee and the inquiries of the D.C. City Council, did they possess the information they needed to sue in vindication of their First-Amendment rights.

The Court denied the motion for judgment on the pleadings.[23] *See Hobson v. Wilson*, Civil Action No. 76-1326 (D.D.C., Oct. 29, 1981). The Court determined that the applicable statute of limitations was the three-year statute in D.C.Code 12-301(8) (1973 ed.), and concluded that issues of fact were presented regarding *inter alia* the state of plaintiffs' actual knowledge of their rights of action on July 16, 1973, the date three years before they commenced this

[23] A similar motion had been denied without prejudice to renewal when this case was assigned to Judge Pratt. *See Hobson v. Wilson*, Civil Action No. 76-1326 (D.D.C., Nov. 9, 1979).

action.[24] As the Court noted, the doctrine of fraudulent or deliberate concealment attaches to every statute of limitations applied in federal-question litigation. *See Holmberg v. Armbrecht*, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946). Issues of this character are not readily susceptible to summary disposition.[25] *See, e.g., Richards v. Mileski*, 662 F.2d 65, 73 (D.C.Cir. 1981); *Smith v. Nixon*, 196 U.S.App. D.C. 276, 283, 606 F.2d 1183, 1190 (1979); *Fitzgerald v. Seamans*, 180 U.S.App.D.C. 75, 83, 553 F.2d 220, 228 (1977); *cf. Emmett v. Eastern Dispensary & Casualty Hospital*, 130 U.S.App.D.C. 50, 396 F.2d 931 (1967); *see also Davidov v. Honeywell Inc.*, 515 F.Supp. 1358 (D.Minn., 1981), at 1361. And if the entitlement to equitable relief under the doctrine of fraudulent or deliberate concealment depends on questions of fact, those issues of fact must be resolved in a damages action by the jury. *See Music Research, Inc. v. Vanguard Recording Soc'y*, 547 F.2d 192 (2d Cir. 1976); *cf. Briskin v. Ernst & Ernst*, 589 F.2d 1363 (9th Cir. 1978); *Jones v. Rogers Memorial Hospital*, 143 U.S.App.D.C. 51, 442 F.2d 773 (1971).

A. The Statute of Limitations Instructions

The recent discussion of the order of proof on a claim of fraudulent or deliberate concealment in *Richards v. Mileski, supra*, together with the seminal decision in *Fitzgerald v. Seamans, supra*, provided the basis for the instructions to the jury. The Court of Appeals in *Fitzgerald v. Seamans* established that a plaintiff's knowledge that some defendants were responsible for his injury did not necessarily

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[24] The Court found that such an application of D.C.Code 12-301(8) to be the law of the case. *See* Memorandum and Order of October 29, 1981 at 2. Judge Pratt's prior Order, while denying the earlier motion without prejudice to renewal, unequivocally decided that the three-year statute was the longest that might apply to plaintiffs' claims.

[25] A plaintiff may, for example, have known his telephone was bugged, or that agents were watching him, without knowing of the conspiracy to disrupt First-Amendment activities.

mean that the plaintiff would have had sufficient knowledge of other defendants' involvement intelligently to have prosecuted his claims against the others. *See* 180 U.S. App.D.C. at 84, 553 F.2d at 229. In *Richards v. Mileski* the Court of Appeals determined that a plaintiff's knowledge that the defendants had injured plaintiff through false accusations that he was not suitable for a job was not equivalent, for purposes of the doctrine of fraudulent or deliberate concealment, to knowledge that those same defendants knew the accusations were false, and that the defendants were involved in a conspiracy to use the accusations against the plaintiff and to conceal their falsehood.

Because the present case involved so many parties and so many particularized allegations of injury, the jury's task was formidable: it had to determine, with respect to each claim, whether a particular plaintiff was, as to a particular defendant on that particular claim, barred from suit by the statute of limitations. As the Court explained that task to the jury, it was necessary first to determine whether the plaintiff had sufficient actual knowledge of his right of action to have intelligently prosecuted it more than three years before the commencement of suit. If he did not, the plaintiff still had the burden of proving that the defendant who had raised the limitations defense deliberately concealed from him those material facts needed for intelligent prosecution. If the plaintiff succeeded in that proof, the defendant then had to prove that plaintiff could nevertheless have discovered the necessary facts within three years of the accrual of the right of action through the exercise of due diligence. *See Richards v. Mileski, supra*, 662 F.2d at 69-72.

Defendants in their motions for a new trial assert that the instructions on the statute of limitations were defective in two respects. First, defendants insist that the jury should have been told that "mere silence by a defendant is not fraudulent or deliberate concealment." Second, defend-

ants argue that the Court erred in instructing the jury that deliberate concealment to serve "law enforcement considerations" defined by the FBI or MPD might—or might not—be the type of concealment against which the equitable doctrine could provide relief. According to defendants, the Court's instruction on that point contradicted "the principle that concealment by a third party may not be attributed to the defendant" and "the principle that the concealment must have been wrongful."

Turning to the second objection first, the instructions did not violate either of the "principles" that defendants recite. The Court did instruct the jury that the defendant or (with respect to conspiracy claims) the defendant's co-conspirators must be proved to have engaged in concealment of the relevant facts. The Court then defined "deliberate concealment" in these terms:

> "By deliberate concealment, I mean that defendant or a conspiracy to which a defendant belonged deliberately kept information away from a plaintiff which was material to that plaintiff's claim. It is immaterial whether the defendant or conspiracy kept the material [sic] from plaintiff because the agency employing the defendant or the conspirators believed that law enforcement considerations required concealment, or whether the material facts were concealed for the purpose of impeding plaintiffs' prosecution of their claims."

Such an instruction seemed essential in avoiding unnecessary complexities of motive in cases of this type. Defendants were alleged to have engaged, over a long period of time, in clandestine disruptive activities; at the time they did so, defendants assumed their efforts would remain covert. The secrecy of their operations obviously would have been violated by civil litigation as surely as it would have been by publicity of any other sort. Defendants, if they did engage in deliberate concealment, could thus have rationalized their conduct either as required for a "law

enforcement purpose," or to protect themselves from liability in damages. Indeed, because secrecy was so important to their missions, it could have seemed to defendants that "law enforcement considerations" themselves required concealment "for the purpose of impeding . . . prosecution" of civil complaints. Like the schemes in *Smith v. Nixon*, *supra*, and *Fitzgerald v. Seamans*, *supra*, concealment of defendants' activities in this case was of essence; it would be impossible for a trier of fact in this case to have determined that the official wrongdoers concealed their operations, not in furtherance of their disruptive objectives, but exclusively to protect themselves from litigation. If, as defendants appear to argue, no concealment for such a "law enforcement" purpose as that they invoked in this case can ever be "wrongful," then there would have been no basis for the determinations in *Smith v. Nixon* and *Fitzgerald v. Seamans* that the plaintiffs in those cases might have been entitled to equitable relief from the statute of limitations. Accepting as true the general proposition that concealment must be "wrongful," *see General Aircraft Corp. v. Air America*, 482 F.Supp. 3 (D.D.C. 1979), the "wrongfulness" in this case, like that in the *Nixon* and *Fitzgerald* cases, consisted of defendants' effort to conceal COINTELPRO and the MPD activities from the public despite the unlawfulness of the FBI and MPD programs.[26]

Defendants' other objection, that the Court erred in no instructing the jury that "mere silence" is not fraudulent or deliberate concealment, is also off the mark. To have instructed the jury in this case that "mere silence" might not be "concealment" for purposes of the limitations defense would have risked confusion. The bare concept of silence is inherently difficult to apply. What matters is not

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[26] Because the instructions required that concealment *vel non* be attributable to the defendant or (with the conspiracy claims) to the overall design of the conspiracy, they would not have permitted verdict based impermissibly on what defendants call "third party" conduct.

some distinction, always difficult to draw, between action and inaction (or "silence") but the deliberateness of a defendant's conduct in foreclosing discovery of the facts a plaintiff would need to prosecute his claim against that defendant. *See Smith v. Nixon, supra,* 196 U.S.App.D.C. at 283, 606 F.2d at 1190. In *Richards,* it was enough that the defendants had published the false reports and then held their peace, knowing the reports to have been false. *See* 662 F.2d at 69-70. In this case, defendants assumed false identities as protesters, as students, and as parade coordinators, or they conducted their operations in a manner otherwise calculated to conceal their official status. They maintained, as far as they were able, secrecy about their undertakings. such conduct is functionally indistinguishable from that in *Smith v. Nixon, supra.* The jury had to be given an opportunity to decide whether what transpired here was not "mere silence" (as defendants characterize it), but instead was "silence" observed by defendants as a strategy for concealment that prevented a timely claim.

Finally, defendants object to the placement of the limitations issue on the special verdict form as the third principal issue for the jury's decision. According to defendants, since the statutory defense bars a claim, it should have been placed first on the special-verdict form, ahead of the questions that required the jury to determine whether any plaintiff had been injured. The Court placed the limitations issue after the injury issues in order to ensure that the jury could make its findings on the statutory defense in the manner contemplated by *Fitzgerald v. Seamans* and *Richards v. Mileski* without undue confusion. The entitlement to equitable relief may, with respect to a particular plaintiff, vary among the plaintiffs' different claims—as in *Richards*—or among different defendants—as in *Fitzgerald.* It would thus have been difficult for the jury to determine which claims were barred, and against which defendants, until it had first isolated for itself the specific allegations each of the nine plaintiffs made. It was therefore better practice to

confront the jury with the basic questions of injury *vel non* first, inasmuch as those questions would, once framed and answered, provide the context for the questions posed by the statute of limitations. In any event, assuming the instructions were not erroneous, there is no indication that the verdicts were affected by the order in which the special form presented the questions for the jury's decision.[27]

B. The proof regarding the limitations defense

Defendants also argue, in their motions for judgment n.o.v. that the proof adduced at trial was insufficient to entitle plaintiffs to relief from the statute of limitations. According to defendants, there was conclusive evidence that plaintiffs knew of the existence of their rights of action prior to July 16, 1973, Defendants also assert that plaintiffs failed to provide adequate evidence of fraudulent or deliberate concealment, and that the evidence showed that the plaintiffs might through the exercise of due diligence have discovered whatever information they needed to commence suit within three years of their injuries. The Court has concluded, however, that the evidence on the relevant issues of fact was not so clearly in defendants' favor as to entitle them to relief under Rule 50. *See Vander Zee v. Karabatsos, supra; see also Pan America Petroleum Corp. v. Orr*, 319 F.2d 612, 614-15 (5th Cir. 1963).

If a plaintiff has actual knowledge of facts that would have permitted him intelligently to have prosecuted a given claim against a defendant more than three years before he actually filed suit, the claim based on those facts is barred. *Fitzgerald v. Seamans, supra; cf. United States*

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[27] It bears noting that defendants, even though they object to the order of questions on the special verdict form, did not object to the Court's preliminary instructions to the jury that stated the limitations defense after the issue of primary injury. Moreover, it bears noting that the Court advised the jury of the important beneficial purposes of the statute of limitations.

v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979). In this case there was highly credible evidence, much of it drawn from depositions of plaintiffs at the earliest stages of the litigation, that plaintiffs strongly suspected official misconduct long before they commenced suit. Certain plaintiffs even admitted that they had discussed among themselves the possibility of suing the government, long before July 16, 1973, and prior to the Church Committee hearings or the D.C. City Council investigations. Certain plaintiffs admitted having read articles published in New York and Washington on "secret" FBI efforts to disrupt protest organizations. The articles specifically mentioned the "Head Tax" scheme, one of the COINTELPRO programs that some plaintiffs alleged injured them.[28] Other plaintiffs admitted to strong suspicions, sometimes confirmed by conclusive information obtained by them prior to July 1973, that some of their anti-war associates were in fact undercover police officers. On the other hand, the evidence did not establish precisely how much the plaintiffs who suspected that they were victims of official interference knew about COINTELPRO or the MPD's activities. Plaintiffs' suspicions were, it appeared, more often vague than specific. They seemed to have had

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[28] According to plaintiffs, in 1969 and 1970 FBI agents attempted to exacerbate disagreements among anti-war and civil-rights activists regarding a proposal that anti-war protesters contribute money to help rebuild Washington after the 1968 riots and to support civil-rights causes. At its inception, a proposal originating with protesters of both races in anti-war and civil-rights groups called on all anti-war organizations to contribute various sums, possibly based upon the level of black attendance at anti-war rallies, to civil-rights and "Black Pride" groups for use in the community. Subsequent disputes regarding that so-called "Head Tax" proposal were intense. According to plaintiffs' evidence, FBI agents who learned of the disputes from their informants attempted to inflate the disagreement by planting suggestions that the anti-war groups pay large lump sums to organizations like the Black United Front. Defendants vigorously denied any involvement in such a scheme.

more knowledge of official surveillance—itself perhaps not unlawful[29]—than of concerted efforts to disrupt their protest activities. And there was ample evidence from which the jury could find that most of the Church Committee's findings provided plaintiffs their first credible account of the conspiracies they alleged.

The jury apparently segregated some claims that it deemed statute-barred from others that it considered not to be barred in a way that lends strong credibility to its overall findings on the statute of limitations issues. *See Richards v. Mileski, supra; Fitzgerald v. Seamans, supra.* The jury found, for example, that any otherwise valid claims against two of the defendants, the undercover officers Bynum and Markovich, were barred by the statute of limitations.[30] There was considerable support in the evidence for those findings. By virtue of those two defendants' infiltration of the protest organizations, the plaintiffs who might have been injured by those two defendants associated closely with Bynum and Markovich. The jury could reasonably have concluded that those plaintiffs either had actual knowledge of the two undercover officers' roles, or could through the exercise of due diligence have discovered their roles, long before July 16, 1973. Indeed, there was evidence that at least one plaintiff had positive evidence that Markovich was a police officer prior to July 1973. But the jury's finding that the claims against Bynum and Markovich were statute-barred did not require a finding that claims against the other defendants, even for the same injuries, were statute-barred. The jury could have determined,

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[29] *See Reporters' Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 192 U.S.App.D.C. 376, 593 F.2d 1030 (1978); *Berlin Democratic Club v. Rumsfeld*, 410 F.Supp. 144 (D.D.C. 1976).

[30] With respect to claims by plaintiff Abbott, for example, the jury found that the various claims against Bynum and Markovich were either barred by the statute of limitations, or should not result in an award of damages because the two defendants were, as to those particular claims, entitled to immunity.

under the rule in *Fitzgerald v. Seamans, supra*, that the plaintiffs' actual knowledge of the undercover officers' activity could not reasonably have been expected to give them an awareness of misconduct elsewhere within the Intelligence Division or within the FBI. Far from being evidence (as the MPD defendants argue) of "inconsistent verdicts," the jury's distinction between claims against the undercover officers and the other MPD Intelligence Division defendants thus suggests a careful judgment that should not be disturbed. Finally, it bears noting, in connection with the verdicts against the other defendants, that the jury may well have found certain claims against them to be statute-barred while it found others not to be barred. *See Richards v. Mileski, supra.* The Court's present task is at an end if it appears from the verdicts and the evidence that the jury could have reasonably found that some claims against a particular defendant were not statute-barred, and that question is easily answered in the affirmative. The jury was entitled to credit the evidence that prior to the spring of 1976 plaintiffs had no awareness, nor could they be expected to have had awareness, of the central connections among the various attacks upon them.

Defendants' challenge to the proof regarding concealment and due diligence is even less powerful than their assertion that plaintiffs had actual knowledge of the material facts more than three years before the commencement of suit. Plaintiffs had the burden of proving concealment of the material facts and they offered considerable evidence in support. There was evidence of the scope and intensity of the FBI's attempts to ensure that COINTELPRO remained secret. There was evidence that the District of Columbia had destroyed a body of Intelligence Division documents in the 1970's and thereby virtually obliterated much of the record of the activities of the Division. The evidence, taken as a whole, thus supported the jury's findings that plaintiffs could not have discovered the material facts needed to prosecute particular claims. Here, too, the jury may have found that, as to particular claims—the "Head Tax" program,

for example—a person could through the exercise of due diligence have discovered the facts needed for suit. But even if the evidence required such a finding on the due-diligence issue as to a particular claim, other claims could survive. Assuredly, the evidence did not compel the jury to find that all the claims a plaintiff had against a particular defendant were discoverable through the exercise of due diligence. The jury's ultimate resolution of the due-diligence issues presented to them therefore will stand.

IV. Limited Official Immunity

All of the individual defendants sought benefit of the limited official immunity for law-enforcement personnel recognized in *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), and later decisions. In their present motion the MPD defendants assert that the evidence compelled a verdict that many of them were immune. The FBI defendants seek relief on the immunity issue only in their motion for a new trial, in which they suggest that the terms the Court used on the special-verdict form to state the immunity question were "inadequate."

The FBI defendants' objection to the special-verdict form's statement of the immunity issue borders on the frivolous. In lengthy instructions that apparently are not now challenged by any defendant, the Court explained to the jury the criteria for qualified official immunity, and indicated how the jury should record the verdict they reached on the immunity claims. Defendants argue, however, that the Court should have included on the special-verdict form a description of "the concept of good faith immunity." Asserting that "[t]he concept of immunity from liability is not one which a jury of laymen could be expected readily to understand," defendants insist that the special-verdict form should have asked: "Did the defendant believe reasonably and in good faith that his actions were proper?" The purpose of the special-verdict form was to provide a mechanism for the jury to record its findings on the

question put to it by the Court; the purpose of the instructions, in whose formulation defendants participated, was *inter alia* to explain the concept of immunity. The criteria for official immunity would, moreover, have required a summary on the special verdict form different from that proposed by defendants. A belief that one's actions were "proper," even if reasonable and characterized by "good faith," obviously will not avail a defendant who does not act within the scope of his authority. *See Procunier v. Navarette*, 434 U.S. 555, 571, 98 S.Ct. 855, 864, 55 L.Ed.2d 24 (1978) (Stevens, J., dissenting); *Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975). Of course, the issue of whether these defendants acted beyond the scope of their authority—that is, "for reasons unrelated to the performance of their duties," *see* 434 U.S. at 571, 98 S.Ct. at 864—was clearly not as important in this case as the question whether they acted with a reasonable and good-faith belief in the propriety of their actions. But the Court had no basis in this case for withdrawing that issue from the jury in the wording of the special-verdict form. Defendants' proposed formulation might have had that consequence and, in any event, their statement of the immunity issue does not appear to the Court to possess any material advantage for a properly-instructed jury over the formulation the Court employed.

The MPD defendants argue that, because many of their activities were lawful and specifically authorized by the regulations governing the work of the Intelligence Division, and because they did not know about COINTELPRO, the jury was required to grant them immunity for any injuries they inflicted on plaintiffs in the exercise of plaintiffs' First-Amendment rights. *See Procunier v. Navarette, supra.* There was considerable evidence at trial touching upon the immunity issue. Plaintiffs offered evidence tending to show that MPD officers, some of them defendants or officers acting in concert with defendants, burglarized offices of organizations in which plaintiffs were active, attempted to

disrupt peaceful protest meetings, and destroyed machinery used by plaintiffs' organizations to reproduce political leaflets. Plaintiffs also offered evidence of regular contacts between Intelligence Division personnel and FBI officials participating in design and execution of COINTELPRO schemes; such evidence could have provided a basis for a finding that the MPD defendants knew enough about COINTELPRO to know that the information they gave the FBI would be used to disrupt and discredit plaintiffs' political activities. Defendants, however, denied any involvement in any activity not specifically authorized by law or Intelligence Division practice, and denied any knowledge of any aspect of COINTELPRO. Based upon that evidence, the jury found some defendants to be immune on certain claims of various plaintiffs, and denied immunity on other claims. The Court cannot say that the evidence that all defendants believed their conduct to be lawful, and that such a belief was reasonable under the circumstances confronting defendants, was so decisive that it would permit the Court to overturn the verdicts. In particular, the strong evidence of burglary committed by MPD officers, and the evidence that various defendants knew of the burglary, contradicted defendants' claims that they believed in good faith and with good reason that their conduct was lawful: no regulation of the MPD relieved the Intelligence Division from the requirement of search warrants.

The jury did, on the other hand, find some MPD defendants to be immune from liability for injuries they inflicted on some plaintiffs. The jury's findings that certain defendants should be immune from liability on certain claims was not, as the other MPD defendants now argue, inconsistent with the jury's other findings that different defendants were not immune.[31] Defendants like Bynum and Markovich,

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[31] The jury found defendants Bynum and Markovich to have been participants in a section 1985(3) conspiracy, and yet also accorded them immunity. Defendants, while arguing that the verdicts were inconsistent because some of them were accorded immunity while others were

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the two defendants whom the jury found most often to be immune from liability in damages, offered detailed justifications for their conduct during their testimony. It was not unreasonable for the jury to see a difference in the belief those officers maintained concerning the lawfulness of their work, and in the reasonableness of that belief, from the belief the other, higher-ranking defendants within MPD may have possessed. Moreover, the jury also found the other MPD defendants, with the exception of defendants Wilson and Herlihy, to be immune from at least some of the claims against them by particular plaintiffs. Wilson and Herlihy were the highest-ranking officers in the MPD group of defendants. Wilson and Herlihy may also have been in the best position to know the law and the facts that might have indicated that the MPD's activities were violating plaintiffs' First-Amendment rights. The Court cannot say that the jury's possible recognition of such a hierarchy

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(Footnote 31 continued)
not accorded immunity, have not suggested that the verdicts were infirm because Bynum and Markovich were found both to have been knowing participants in an actionable conspiracy and also entitled to immunity. The jury assuredly trod a narrow line in returning these verdicts. There is, however, adequate basis in the evidence for the distinction the jury drew and, perhaps for this reason, the defendants have not assigned this point as error. The evidence did not compel a finding that Bynum and Markovich acted from malice. They were at the end of the chain of command. There was evidence and inference from which the jurors could rationally conclude that Bynum and Markovich were entitled to rely for approval of their actions upon the direct orders of their superiors. Bynum and Markovich possibly may have shared the discriminatory animus required for participation in the conspiracy, and joined fully in the conspiracy's objectives, and yet could not be reasonably expected (given the peculiar circumstances of their involvement in the MPD's activities) to have known their conduct was unlawful or improper under the First Amendment. *Compare Griffin v. Breckenridge, supra, with Wood v. Strickland, supra, and Bogard v. Cook*, 586 F.2d 388, 414 (5th Cir. 1978). Particularly because defendants do not suggest this point as grounds for challenging the verdict, the Court will not disturb the verdicts on this matter.

of responsibility was insupportable on the evidence adduced at trial. The plausibility of a defendant's claim that he did not know and should not have known about the MPD's involvement in COINTELPRO, or that he reasonably and in good faith believed his own conduct and that of the Department to be lawful, might well depend on the defendant's position with the MPD and within the Intelligence Division.

V. Admissibility of plaintiff's exhibits

Portions of plaintiffs' proof of their claims against the FBI and MPD defendants came from FBI documents obtained either in discovery in this case or through invocation of plaintiffs' rights under the Freedom of Information Act, 5 U.S.C. § 552. In their motion for a new trial defendants object to the admission of certain documents that, in defendants' words, "did not pertain to any defendant, but which could inflame or mislead the jury." *See* Fed.R.Evid. 401-03. Defendants' specific objections pertain to documents that described FBI attempts to discredit leaders of the Black United Front and to exacerbate difficulties experienced by plaintiffs and other protesters in their efforts to coordinate joint activities of the Black United Front and several anti-war organizations. The Court will, in addressing this ground of defendants' motion, also summarize the other main evidentiary problems in the case, so that defendants' present objections may be seen in context.

During trial, the FBI defendants objected to submission to the jury of excerpts from the Final Report of the Church Committee that described the COINTELPRO operation. The parties reached some agreement about the portions of the Report that might be submitted to the jury. Adopting the view of Rule 803(8)(C) endorsed by this Court in *United States v. American Telephone & Telegraph Co.*, 498 F.Supp. 353, 359-60 (D.D.C. 1980), the Court admitted other segments of the Church Committee's reports proffered by

plaintiffs and not covered by stipulation, some of which took the form of factual "evaluative reports" rather than mere compilations of data. *See United States v. American Telephone & Telegraph Co., supra;* S.Rep. No. 93-1277, 93d Cong., 2d Sess. 18, *reprinted in* [1974] U.S.Code Cong. & Admin. News 7051, 7064. While the admission of "evaluative reports" under Rule 803(8)(C) appears to have been disfavored by the report of the House Judiciary Committee on Rule 803(8)(C), "[e]xtrinsic materials indicate that the Rule is most appropriately considered by following the Senate Committee's position." *See* 498 F.Supp. at 359. *See also Robbins v. Whelan*, 653 F.2d 47 (1st Cir.), *cert. denied*, 454 U.S. 1123, 102 S.Ct. 972, 71 L.Ed.2d 110 (1981). The Court thus permitted the jury to have the Church Committee's findings regarding the organization of COINTELPRO, the Committee's summary of COINTELPRO's basic target groups (both drawn directly from internal FBI documents), and similar materials. The segments of the Church Committee Report submitted to the jury reflected adherence to appropriate standards of scholarly responsibility, investigative integrity, and trustworthiness. Indeed, the quality of the Report is perhaps evidenced by the fact that similar portions of the same Report have been relied upon by this Court and in other circuits for the background they have provided in other cases concerning COINTELPRO.[32] *See, e.g., Sims v. CIA*, 642 F.2d 562, 564 (D.C.Cir. 1980).

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[32] To the extent defendants' objection at trial was based, not on the untrustworthiness of the Report or its assertedly "evaluative" quality, but on some prejudicial effect on the defense of the claims against them, it was not well-taken. The Report was clearly relevant to the claims plaintiffs made against the FBI defendants regarding their participation in COINTELPRO. The Court instructed the jury on the requirement that a defendant be proved to be personally liable, either through participation in a conspiracy or through non-conspiratorial activity, and on plaintiffs' burden of proving that liability as to any defendant they charged with responsibility for their injuries. Rule 403 itself creates a presumption against exclusion of relevant evidence. If deemed an

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The Court also admitted, over defendants' objections, portions of the sworn testimony given by various MPD officials in the course of an investigation of Intelligence Division wrongdoing, conducted in 1975 and 1976 by Assistant Chief Melvin I. Winkelman and by the United States Attorney for the District of Columbia. The FBI defendants particularly objected to admission of Plaintiff's Exhibit 88, which was an excerpt of a sworn statement by former MPD employee Charles Marcum in which Marcum told the investigators of a covert MPD entry at the offices of protest organizations in which certain plaintiffs were active. According to Marcum's testimony, MPD officers told him they delivered the materials they took from those offices to FBI agents involved in COINTELPRO. In his testimony Marcum described his own participation in the break-in, and recounted for the investigators reports he had heard from others that a box of documents taken from the offices found their way to the FBI. The Court admitted so much of the excerpt as constituted an admission against interest by Marcum—who was unavailable for testimony in this action—but excluded from the statements it admitted any segment that consisted of double hearsay. *See* Fed.R.Evid. 804(b)(3), 805.

The FBI defendants also objected at trial to admission of segments of various plaintiffs' FBI files, which were prepared by a number of FBI agents over the course of many years while plaintiffs were under official surveillance. They press that objection in the present motion as well, on the ground that "[n]one of the federal defendants were directly involved in the investigation of any plaintiff," so that the admission of the plaintiffs' files would "permit the

(Footnote 32 continued)
objection under Rule 403, then defendants' objection to the Church Committee excerpts the Court found otherwise admissible under Rule 803(8)(C) cannot overcome that presumption. *See Miller v. Poretsky*, 193 U.S.App.D.C. 395, 408, 595 F.2d 780, 793-94 (1978) (Robinson, J., concurring).

jury to consider, and potentially hold defendants liable for, investigative activity which the federal defendants would not have been involved in and would not have known about." The evidence showed that defendants, as agents with roles in implementation of COINTELPRO, were expected to use all information possessed by the Bureau to develop effective programs of disruption and harassment; indeed, the FBI memoranda that launched COINTELPRO in 1967 and 1968 instructed agents to maintain current files on the targets of COINTELPRO to enhance the effectiveness of the program of disruption. Consideration of plaintiffs' files by the jury could have enhanced the jury's understanding of defendants' efforts to interfere with their First-Amendment rights in the manner intended by COINTELPRO. The files were thus admissible, on their face, under Rule 401.

Defendants argue, however, that consideration of the files would also have had an unfairly prejudicial effect. It is true, of course, that plaintiffs did not establish—nor could they have—that the segments of the files proffered for the jury were all segments that one defendant or another used against a plaintiff in the course of COINTELPRO. But the Court carefully instructed the jury that defendants could be liable only for their own action and for their own knowing participation in a conspiracy, and that intelligence-gathering, including so-called "non-criminal surveillance," was not in itself actionable in this case. *See Reporters's Committee v. American Telephone & Telegraph Co., supra; Berlin Democratic Club v. Rumsfled, supra; cf. Jones v. Unknown Agents of the Federal Election Com'n,* 198 U.S.App.D.C. 131, 613 F.2d 864 (1979), *cert. denied,* 444 U.S. 1074, 100 S.Ct. 1019, 62 L.Ed.2d 755 (1980). A court must not exclude relevant evidence when it appears confusion or prejudice can be avoided by instructions. In the present case, to have committed the error defendants suggest, the jury would have had to ignore the Court's instruction that intelligence-gathering and information retention were not a basis for liability in this case. Given the

documents' probative value in demonstrating the character of defendants' interference in plaintiffs' activities, there was no justification for exclusion under Rule 403.[33]

Defendants also renew in their motion for a new trial an objection to admission of Plaintiff's Exhibits 23, 24, 25, 31, and 31A. Exhibits 23, 24, and 25 included a copy of a leaflet, anonymously authored by an FBI agent who was not a defendant, that purported to come from a white anti-war protester angered by demands, attributed to the Black United Front, that the anti-war protesters pay blacks to cooperate in various anti-war activities in which some white plaintiffs participated.[34] The other pages of these three exhibits were FBI memoranda that discussed possible use of the false leaflet and approved its distribution. In Exhibit 24, which bore the names of defendants Brennan and Moore as either originators or addressees, the Director gave permission to distribute the leaflet, whose objective was, according to the memorandum admitted as exhibit 23, "to widen the rift between the New Mobilization Committee . . . and the Black United Front." Exhibit 25 apparently accompanied a batch of the leaflets given to the WFO, whose agents were instructed to distribute them to appropriate people in Washington in a manner concealing Bureau involvement. All the FBI defendants denied having ever seen the leaflet or the memoranda, or knowing anything about the leaflet. The Court admitted the materials, however, because plaintiffs offered relatively credible evidence that, given the organization of COINTELPRO within the FBI, such documents would have probably required some review by various defendants; the strongest evidence of such a pattern was, of course, the presence of two defendants' names on the critical document approving distribution of the leaflet. The exhibits were highly probative of several

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[33] The Court admitted only segments of plaintiffs' files, and defendants appear to make no suggestion that the evidence was cumulative.

[34] This was so-called "Head Tax" scheme. *See* note 29 *supra*.

plaintiffs' claims of injury against several defendants. Despite its arguably inflammatory language and graphics of Exhibit 23,[35] which appears to have been intended to portray its author as a white racist who had contempt for the Black United Front, the leaflet could not be withheld from the jury. Defendants remained free to argue that they should have no responsibility for the leaflet, and it was for the jury to decide the ultimate questions of fact raised by that defense.

Exhibits 31 and 31A included another anonymous leaflet, attributed to a member of the National Steering Committee of the New Mobilization Committee, but in fact prepared by the FBI's New York Field Office. That leaflet excoriated the New Mobilization Committee for its insensitivity to the needs of the Black United Front. Exhibit 31 indicated that the leaflet has a purpose similar to that of the leaflet supposedly authored by the white racist anti-war protester and admitted as Exhibit 23. As with the "racist" leaflet, the New York agents who originated the second leaflet proposed that members of the WFO distribute it to best effect in the Washington area. Like the "racist" leaflet, this leaflet was sent to FBI headquarters for approval by the Director. The evidence of involvement by defendants Moore and Brennan in execution of the proposal from New York office is, however, only circumstantial: their names do not appear on the memorandum that originated in New York transmitting the leaflet, and plaintiffs did not proffer a memorandum that, like exhibit 24, evidenced headquarters approval of the pro-

[35] Without attempting to suggest which passage of Exhibit 23, if any, would have particularly outraged a reader, the Court will note that the document is replete with racist and scatological references. The leaflet calls one leader of the Black United Front "nothing but a black blackmailer," and warns, "Mr. Moore and his pack or herd or pride or whatever you call a group of bloodsucking animals, are in for a shock." The leaflet then proposes, "[I]f they must get something in return for their nonviolence towards NMC during these days of demonstrations, give them BANANAS [sic]—all they can eat."

posal from the New York office. On the other hand, plaintiffs offered credible evidence that Brennan and Moore had routine oversight of proposals like that from the New York office, and there was evidence that materials routed to them in the course of COINTELPRO ordinarily did not mention them by name, but were simply referenced "COINTELPRO" and addressed formally to the "DIRECTOR, FBI." Plaintiffs also argued that defendants assigned to WFO might have participated in plans to distribute the leaflet prepared in New York, since the New York agents clearly intended that they do so. The proof of liability for any injuries attributable to exhibit 31A was also circumstantial. But plaintiffs' theory of defendants' involvement, at least at the headquarters level, was consistent with the strong evidence of the headquarters defendants' involvement in similar COINTELPRO schemes. And, if the jury believed plaintiffs' assertions that the headquarters defendants had been involved in consideration exhibit 31A, then exhibits 31 and 31A would have been probative of the scope and character of the conspiracy plaintiffs alleged. Moreover, the content of exhibits 31 and 31A was not so inherently offensive as significantly to risk distortion of the jury's sense of fairness. As its base the only ground for defendants' objection to admission of exhibits 31 and 31A was that proof of their participation in the scheme the exhibits described was circumstantial rather than direct. Article Four of the Evidence Rules does not preclude introduction of circumstantial proof. *Cf. Miller v. Poretsky, supra.* The probative value of the exhibits outweighing any possible prejudicial impact, the Court admitted them, and cannot now say that their admission is a ground for a new trial.

VI. The motion of defendant Jones.

In a motion for judgment n.o.v. stating grounds unique to his defense, defendant Jones renews his argument before trial that he was entitled to involuntary dismissal of

the claims against him under Fed. R. Civ. P. 41(b) or, in the alternative, to a continuance of trial on the claims against him. In the present motion Jones contends that plaintiffs so substantially delayed service of the amended complaint naming him as a defendant that he was prejudiced in his defense, and that dismissal under Rule 41 should have occurred before trial even in the absence of affirmative evidence of prejudice.

Jones was not named as a defendant in the first complaint filed by plaintiffs in July 1976. By 1977, however, once discovery had begun, plaintiffs learned of Jones' role in the "internal security" activities of the WFO, and apparently believed him to have injured them in connection with COINTELPRO effort at the WFO. Accordingly, plaintiffs included Jones as one of the FBI defendants named in the amended complaint filed late in 1977. Plaintiffs thereupon made several attempts—attempts whose good faith is not questioned here—to serve Jones with the papers. First plaintiffs attempted service of Jones at the WFO; later they left the papers at his residence in the Virginia suburbs. In December 1978, Jones pursuant to 28 C.F.R. § 50.15 (1977), requested appointment of counsel for him by the Department of Justice. The Department, granting the request, assigned the lawyer who was representing all the other FBI defendants in the case to Jones.[36]

In 1979, defendant Jones, together with defendant Wilfred R. Schlarman, moved for dismissal of the claims against them. As Judge Pratt, to whom this case was then assigned, summarized their motion, defendants asserted that, as to themselves, "service of process was not effected upon a person of 'suitable age and discretion' at their homes in accordance with Rule 4(d)(1) of the Federal Rules of Civil Procedure. For both defendants, service was not made upon the defendants personally or upon any other individual."

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[36] That lawyer has represented all the FBI defendants since the beginning of the case.

Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Nov. 9, 1979), slip op. at 7. Judge Pratt granted the motion without prejudice to fresh attempts to serve process. *See id.* at 8; Local Rule 1-4. After the case had been reassigned to the trial judge in September 1980, the Court directed the parties to "propose a practical solution for the problem posed by the failure to effect service on a number of defendants," including defendant Jones, who had still not been served. *See* Order of November 14, 1980. At status calls held in late 1980 and in January 1981, the Court discussed the failure of plaintiffs to serve Jones and other defendants; however, counsel for the "served" FBI defendent declined to take action, claiming not to represent those unserved defendants and because those defendants "are not under the personal jurisdiction of the Court." *See* Letter of David H. White (dated November 25, 1980), filed as Attachment to Order of December 8, 1980.

On June 21, 1981, plaintiffs perfected service of process upon defendant Jones after having successfully subpoenaed him for a depositon in this case earlier in 1981. Under Pretrial Orders then in effect, discovery in the case was to terminate at the end of July, 1981, but defendant Jones did not seek an extension of the discovery period.[37] Instead, on August 30, 1981, defendant Jones moved for dismissal of the claims against him *inter alia* for failure to prosecute. Jones argued he would be unfairly disadvantaged by trial in the fall of 1981, and that plaintiffs' failure to serve him in a more timely fashion was willful and inexcusable. On October 29, 1981, the Court denied Jones' motion to dismiss. Addressing the claim under Rule 41, the Court wrote in the Memorandum of October 29:

> Jones' suggestion that the claims against him should be dismissed for failure to serve process in a timely

[37] Plaintiffs, in connection with discovery problems unrelated to Jones and his defense, sought and obtained from the Court several extentions of the discovery termination date.

> fashion must . . . be rejected, inasmuch as he will suffer no prejudice if plaintiffs are precluded from raising any claim against him not stemming from acts already involved in the litigation against other defendants who are represented by Jones' counsel, and who were with Jones in the Federal Bureau of Investigation at the time of his allegedly unlawful conduct. Counsel for Jones is invited to submit with his pre-trial brief an appropriate order concerning claims to be precluded.

Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., Oct. 29, 1981), slip op. at 5.

Jones' FBI counsel never submitted the proposed order sought by the Court. Instead, on November 17, 1981, Jones moved for reconsideration of the decision of October 29, 1981, and FBI counsel sought to withdraw form representation of Jones. The latter motion was expressly premised on a belief, supposedly based upon the language from the October 29 Memorandum quoted above, that the only reason the Court denied the Rule 41 motion was the fact that Jones shared FBI counsel with other previously-served defendants. At a status call on November 20, 1981, another member of the District of Columbia bar made a limited appearance on Jones' behalf, in the event the Court granted FBI counsel's motion, and indicated, in papers filed on the eve of trial, an intention (if he entered the case as counsel for Jones) to file a third-party complaint against the United States and to seek continuance of the trial date set in the Court's Order of August 14, 1981. The Court denied Jones' FBI counsel's motion to withdraw, informed counsel who made the limited appearance that he had leave to enter a general appearance and to appear on Jones' behalf at trial, and rejected the motion for reconsideration of the October 29 Order. Jones' FBI counsel still did not file the proposed order sought in the October 29 Order, and counsel who had made the limited appearance on Jones' behalf appeared not to take an active role in court on Jones' behalf.

In the present motion, Jones, through his FBI counsel, renews his argument that dismissal under Rule 41 was

required, and asserts that denial of his motion prejudiced his defense. In the relatively unusual circumstances of this case, it may well be that plaintiffs' counsel have displayed unusual indifference to the requirements of service of process. But the Court has a larger responsibility to ensure fair and orderly trial. A defendant, positioned as defendant Jones was within the group of FBI defendants and possessing actual knowledge of the claims against him, should not exploit the technical defects of a plaintiff's service of process to force upon the Court the difficult question of whether to bar suit against him, or whether to grant a continuance whose practical impact would be tantamount to the barring of suit. Jones' argument now appears to be that nothing short of complete dismissal—or an extensive continuance—would have sufficed, because, from the time he was disimissed from the action in late 1979 until service was perfected in the spring of 1981, he was entitled to assume plaintiffs had lost interest in prosecution of their claims against him. But the extent of the delay in service in this case requires the Court to determine, with some precision, whether Jones was in fact prejudiced by the late service of papers. *See Messenger v. United States*, 231 F.2d 328 (2d Cir.1956). In a case such as this, involving common counsel and a movant who was well-placed to know of the progress of the litigation and perhaps to be involved in the defense, the Court should "assess the prejudice *vel non* suffered by [the movant] rather than . . . the degree of the plaintiff's 'neglect' as to that defendant." *Bersch v. Drexel Firestone, Inc.* 389 F.Supp. 446, 464 (S.D.N.Y. 1974), *rev'd in part on other grounds*, 519 F.2d 974 (2d Cir.1975); *see also Preston v. Mendlinger*, 83 F.R.D. 198, 199-201 (S.D.N.Y.1979). And, since defendant's argument is based ultimately on a claim of unfair surprise, the Court ought to examine carefully the steps Jones took once he was served with the papers in June 1981. His claim that he lost the opportunity to engage in discovery is difficult to maintain, since he did not either seek discovery

beyond that already pursued by his fellow FBI defendants or request an extension of the discovery period to plan and then obtain additional discovery. And his claim that it was in a larger sense "unfair" to have put him to his proof on claims plaintiffs had taken years to develop ignores his own failure to pursue the Court's proposal in October 1981 that various claims against him be precluded. It also seems improbable that Jones could not have anticipated, prior to the eve of trial, the need to seek a continuance of trial on the claims against him.

The Court cannot find in the circumstances of Jones' defense as it developed at trial the kind of prejudice that could have justified the extreme remedy that Rule 41 sometimes permits. The policies of fairness embodied in Rule 41 must be enforced. *See Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Anderson v. Air West*, 542 F.2d 522 (9th Cir.1976). But federal civil procedure favors disposition of claims on their merits. *Keegel v. Key West Trading Co.*, 200 U.S.App. D.C. 319, 320-21, 627 F.2d 372, 373-74 (1979). It was not apparent from the trial that defendant Jones was in any way prejudiced in his defense: like the other four FBI defendants, Jones was ably represented by the counsel appointed for him in December 1978 by the Department of Justice. While the nature and degree of each FBI defendant's responsibility for the injuries plaintiffs alleged surely differed, Jones, as a litigant, appears to have fared no better, and no worse, than the other FBI defendants. There was no adequate basis shown for dismissal of the claims in October 1981; there was no basis for a continuance of trial shown in November 1981. And there is no basis now for grant of judgment n.o.v. to defendant Jones.

VII. Plaintiffs' Contact with Dismissed Jurors

During the lengthy trial of this action the Court had occasion to discharge several members of the panel selected for service on the jury and to seat alternates in their

places. It appears that, following the close of the evidence on December 14, 1981, but prior to delivery of closing arguments to the jury, one of counsel for plaintiffs contacted a person who had sat on the jury in the early days of trial but who had been discharged on December 3, 1981. Plaintiffs' counsel apparently discussed with the dismissed juror her view of the case and the evidence on the telephone on the afternoon of December 14.[38] On December 18, 1981, the Court examined the dismissed juror in proceedings on the record in Chambers and invited questions from counsel. The next day the lawyer for plaintiffs who had contacted the jurors made a statement on the record, and the Court again invited questions from counsel. FBI defendants thereupon moved for a mistrial, and the MPD defendants later joined in the motion. The motion was denied. In their present motions all defendants seek a new trial based upon plaintiffs' contact through their counsel with the discharged jurors.

It appears from the statements of plaintiffs' counsel and the discharged juror whom they succeeded in contacting and questioning that that discharged juror freely offered her opinions regarding the evidence she had heard and also described the opinions she perceived the other members of the panel to hold. The discharged juror, in having the conversation with plaintiffs' counsel, must have misunderstood or forgotten the Court's instructions to her at the time of her discharge, that she not discuss the case with anyone "on the outside." Plaintiffs' counsel may have also misunderstood or forgotten the Court's instructions to the discharged juror. The matter is now the subject of an inquiry by a the Disciplinary Committee of this Court,

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[38] Plaintiffs' counsel did not inform the Court or opposing counsel of her intention to contact the dismissed juror. It was only when another dismissed juror informed staff of the Court in the Jury Lounge that plaintiffs' counsel had unsuccessfully tried to reach him on the telephone that the matter came to light.

initiated by the Assistant Attorney-General for the Civil Division. The question here must be whether plaintiffs' counsel's disregard of the Court's instruction to the dismissed juror, and of the general standards that should control any contact by counsel with jurors in any case,[39] constitutes grounds for a new trial. The rule that should govern remains that established in *Mattox v. United States*, 146 U.S. 140, 147-50, 13 S.Ct. 50, 52-53, 36 L.Ed 917 (1892), which sets up a presumption that any contact of this character should invalidate a verdict unless its harmlessness can be shown. "A trial judge should not hesitate to grant a new trial where there is any significant doubt whether the presumption of prejudice has been overcome." *Ryan v. United States*, 191 F. 2d 779, 781 (D.C.Cir.1951), *cert. denied*, 342 U.S. 928, 72 S.Ct. 368, 96 L.Ed. 691 (1952).

Leaving to the appropriate forum the question of whether disciplinary action is indicated in this case, the Court has determined that a new trial should not be granted on this ground. The parties had rested at the time of the contact with the dismissed juror. There was no longer an opportunity for plaintiffs to have conformed their proof to the advice of the dismissed juror. The only direct effect her advice could have had would have been on design of closing statements, and perhaps in final argument to the Court regarding the Court's instructions to the jury. The information plaintiffs gained has no impact at all on the Court's instructions, and apparently no effect on plaintiffs' requests in connection with the instructions. The only discernible effect the conversation with the discharged juror appears to have had on plaintiffs' closing was on plaintiffs' discussion of the statute-of-limitations issues in their closing. Perhaps because the dismissed juror had told plaintiffs' counsel that she believed the limitations defense to be difficult to understand, plaintiffs' counsel took pains to emphasize the basic simplicities of the defense. That is,

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[39] *See* Local Rule 1-28.

however, the only possible effect on the trial that the Court's inquiries have disclosed, and even it is highly speculative. And there is no suggestion that counsel's argument on the limitations was in itself inappropriate in any concrete way. Defendants' counsel had ample opportunity to answer plaintiffs' argument on the limitations issue, and they did so. Even if it is assumed that plaintiffs' counsel formulated their closing argument, perhaps particularly that touching the limitations defense, with the discharge juror's comments in mind, the Court finds there was no prejudicial impact on the jury's verdicts stemming from the incident.

VIII. Damages

The jury, having found particular defendants liable to the plaintiff's, awarded sums of compensatory and punitive damages amounting to $93,750 to each of five plaintiffs and $81,062.50 to each of the other three prevailing plaintiffs; individual defendants' libility ranged from $75,000 to $9,375. The jury's award may be summarized on the following table, which indentifies the three prevailing plaintiffs who received the lesser sum as "Group 1 Plaintiffs" and the five who received the greater sum as "Group 2 Plaintiffs."

	Each Group 1 Plaintiff (Booker, Eaton, Hobson)	Each Group 2 Plaintiff (Abbott, Bloom, WPC, Pollock, Waskow)
Brennan*	$9,375	$9,375
Moore*	$7,500	$7,500
Jones*	$5,625	$5,625
Grimaldi*	$4,687.50	$4,687.50
Pangburn*	$5,625	$5,625
Wilson*	$5,625	$5,625
Herlihy*	$4,687.50	$4,867.50
Acree	—	$2,562.50
Scrapper	—	$3,125
Jagen	—	$2,562.50
Suter	—	$2,562.50
Mahaney	—	$1,875
District of Columbia	$37,973.50	$37,937.50

*Award includes punitive damages (one-third of total award). *See* page 1165 *supra*.

The sharp graduation in the amounts the jury fixed reflects the jury's judgment, based upon the Court's instructions and the evidence, regarding the extent of the injury suffered by plaintiffs and the measure of each defendant's responsibilities for those injuries.

In the present motions defendants make numerous objections to the jury's awards. Defendants argue that the awards were excessive and against the weight of the evidence; that the awards reflect an impermissible mathematical proportionality that reveals their arbitrariness; that punitive damages should not have been awarded at all; and that the award against the District of Columbia was wholly out of proportion to any other awards and thus was particularly arbitrary. In addition, the FBI defendants assert that the Court erred in not instructing the jury that

the United States itself would not pay an award against the federal defendants. The District of Columbia defendants also argue that the Court's instructions and the special-verdict form permitted the jury to grant an impermissible "multiple" award against several defendants for a single injury, and therefore allowed double, or more than double, recoveries.

The Court's instructions on compensatory damages were based principally on the two critical decisions of the Court of Appeals on First-Amendment damages: *Tatum v. Morton*, 183 U.S.App.D.C. 331, 562 F.2d 1279 (1977), and *Dellums v. Powell*, 184 U.S. App.D.C. 275, 566 F.2ds 167 (1977), *cert denied*, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed. 2d 1161 (1978). As the Court advised the jury, compensatory damages embrace proven out-of-pocket damages and a fair and reasonable amount for any proven physical pain, mental suffering, and for the intangible, though nonetheless real, loss of First Amendment rights of speech, assembly, protest, and association. *Dellums v. Powell, supra*, 184 U.S. App. D.C. at 302-04, 566 F.2d at 194-196; *Tatum v. Morton, supra*, 183 U.S.App.D.C. at 334-37, 562 F.2d at 1281-85; *id.* 562 F.2d at 1285-87 (Wilkey, J., concurring). The Court took pains to inform the jury that the burden of proof of such actual injury as could be a basis for compensatory damages rested upon each plaintiff. *Cf. Carey v. Piphus*, 435 U.S. 247, 262-65, 98 S.Ct. 1042, 1051-53, 55 L.Ed. 2d 252 (1978); *see also Halperin v. Kissinger*, 196 U.S.App. D.C. 285, 300 n. 100, 606 F.2d 1192, 1207 n. 100 (1979), *aff'd by an evenly divided Court*, 452 U.S. 713, 101 S.Ct. 3132, 69 L.Ed.2d 367 (1981). The Court also instructed the jury that, "insofar as it seeks to compensate intangible losses of First-Amendment rights, your award must be proportioned to the loss actually suffered by a plaintiff" whose exercise of First-Amendment rights the defendant was found to have impeded. *See Dellums v. Powell, supra.*

Turning first to the objections to the instructions and to the verdict form, there is no merit in the federal defendants'

claim that they were entitled to an instruction that the United States would not pay a judgment against them. There was no trace of evidence, in plaintiff's case or in defendants' case, regarding possible disposition of judgments against these active and retired employees of the United States, and therefore no basis for any instruction on the matter. Defendants were entitled to offer proof of the hardship an award might cause, and to argue hardship to the jury; to a limited extent, they attempted both, and the jury's awards may reflect a judgment regarding those hardships to the extent of the evidence on the issue. Nor is there merit in the District of Columbia defendants' suggestion that the instructions and verdict form permitted "multiple" recoveries. In cases of this type, there may be some danger of a duplicative award. *See Dellums v. Powell*, *supra*, 184 U.S.App.D.C. at 317-18, 566 F.2d at 209-10 (Leventhal, J., concurring). The Court therefore instructed the jury to divide the sum it fixed to compensate an injury among all those it found responsible for it, and the special verdict form, with its separate spaces for each defendant, would have dissolved any belief on the jury's part that the damages should not be so apportioned.

The defendant's objection to "rigid arithmetical calculation" in the jury's award of damages possesses, in the abstract, no weight at all. The jury was entitled to apportion damages in accordance with the instructions. Defendants cannot now presume to impeach the awards against them because they reflect particular ratios, or seem to defendants to have been derived in a particular manner. The only question is whether those verdicts were excessive, or obviously irrational in some other way that would entitle defendants to relief from them.[40] The Court turns to that question now, discussing first the jury's award of compensatory damages and then its award of punitive damages.

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[40] Defendants point variously to the asserted "disproportionality" of the award against the District government and the equality of the awards against two federal defendants as indications of irrationality. *See* pp. 1192-1193 *infra*.

A. Compensatory Damages

Plaintiffs offered extensive evidence of efforts by defendants within the FBI and the MPD to impeded the exercise of First-Amendment rights. The evidence included evidence from which the jury could have reasonably concluded that plaintiffs were in fact impeded in the exercise of those rights. The jury was required by the instructions, however, to limit its award of compensatory damages to the injuries actually suffered by plaintiffs in the exercise of their rights; an attempt by defendants to injure the plaintiffs in the exercise of their rights that did not succeed could not have been the basis for an award of compensatory damages, and the award based upon a successful attempt to impeded First-Amendment activities had to be measured by the degree of defendants' success. Apart from the intrinsic difficulties of placing some monetary value on rights that are so often said to be "Priceless," the jury thus had a difficult task in assessing the intangible injuries the plaintiffs suffered: it had to decide how far defendants' plans to disrupt and discredit plaintiffs' activities actually succeeded. A Court must be reluctant to disturb a jury's work of this kind. Valuation of political and dignitary rights is peculiarly within the competence of a jury. Damage actions by political figures for official abuse of power were well-known at the time when our Constitution and the First Amendment were written, and they were tried to juries. *See, e.g., Wilkes v. Wood*, 98 Eng.Rep. 489 (K.B.1763). But the duty of the trial judge to test a verdict for excessiveness and grant relief from one that oversteps the limits of reasonableness is equally plain. *See Collins v. Brown*, 268 F.Supp. 198, 201 (D.D.C.1967) (Holtzoff, J.). Discharge of this responsibility has always been "regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right." *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400, 408 (4th Cir. 1948). The Court's function of review is particularly important in public actions like the present one. *See Dellums v. Powell, supra*, 184 U.S.App.D.C. at 319, 566 F.2d at 211 (Leventhal, J., concurring).

There was evidence in this case which supported findings that the defendants' conduct injured plaintiffs by denying them full association with other persons for pursuit of their social and political causes. The full extent of defendants' disruption of the associational privilege recognized by the First Amendment is especially difficult to assess, and so here, as in *Tatum v. Morton* and *Dellums v. Powell*, the compensatory award should be "reasonably spacious." *See Tatum v. Morton, supra*, 183 U.S.App.D.C. at 334, 562 F.2d at 1282. The evidence did not an could not establish with certainty, for example, how many people were discouraged from participation in the semi-annual protests against the Viet Nam War in Washington when defendants diverted protesters to non-existent overnight lodgings, cancelled intercity bus transportation, and interfered with student marshalls' parade communications. Internal memoranda by FBI agents, however, boast of solid successes in deterring anti-war activities. There was, for example, evidence to prove that the attempt to exploit differences between the predominantly white elements (including plaintiffs) of the anti-war movement and black persons in the civil rights movement (including other plaintiffs) delayed collaboration between them and stirred racial distrust for a substantial period of time. There was solid evidence that the unrest thus generated by defendants wasted valuable time and energy and generated considerable anguish, and that plaintiffs were thereby diverted from pursuit of their protest activities.

But to define injury is not to measure it. The jury's quantification of the losses plaintiffs proved to them must be reviewed by the Court. The leading cases provide important guidance. In *Dellums*, the jury returned verdicts of $7,500 for each member of a class of persons unlawfully removed from the steps of the U.S. Capitol and detained by police during a public rally. The Court of Appeals held that the instructions had failed to provide sufficient guidance to the jury in measuring compensatory damages and reversed

the judgments. The Court also concluded that the jury's award was "totally out of proportion to any harm that has been suffered." *See* 184 U.S.App.D.C. at 304, 566 F.2d at 196. The Court of Appeals noted that the parties might seek, on remand, a determination by the trial judge of appropriate damages on the record at the first trial. 184 U.S.App.D.C. at 304 n. 87, 566 F.2d at 196 n. 87. On remand the trial judge, on the motion of the parties, fixed damages at $750 for each class member based upon a supplemental trial record.[41] In *Tatum v. Morton*, on the other hand, the trial court awarded plaintiffs, who had been unlawfully removed from an area near the White House, arrested, and subjected to unjustifiable rough treatment by police officers, only $100 each. The Court of Appeals reversed the judgments because it considered $100 inadequate to compensate each plaintiff for the loss of First-Amendment rights. On remand, the trier of fact awarded sums of roughly $1,000 for each unlawful arrest, $400 for each "strip search" of a plaintiff, and various other sums for injuries that resulted from the unlawful action of the police. There was no further appeal.

The present case is different from *Dellums v. Powell* or *Tatum v. Morton* in important ways: the injuries suffered here are for the most part quite unlike the traditional, hands-on common-law torts like assault and false imprisonment that helped guide the courts in *Dellums and Tatum v. Morton*. Here no blows were struck. There was no physical restraint. None of these plaintiffs were so completely deterred from the exercise of their First-Amendment rights by defendants interference or harassment that the jury could have awarded sums that represented the total loss of the right to protest against the government; total loss of the right would, of course, have been "priceless," in any sense of the word. On the other hand, the jury was not

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[41] *See Dellums v. Powell*, Civil Action No. 2271-71 (D.D.C., Dec. 13, 1979).

required by the evidence to treat lightly the injuries suffered by plaintiffs simply because they were much smaller than they might have been. *Cf Tatum v. Morton, supra*, 182 U.S.App.D.C. at 335, 562 F.2d at 1283. The defendants' actions were sustained over a much longer period of time than was involved in the confrontation-like situations considered in the earlier cases. Not one, but many efforts at association and expression were affected. The jury could have observed, and reacted, to the evidence of the cumulative effect on each individual plaintiff of repeated, persistent, though subtle, harassment to impede political association and expression. The relatively limited nature of defendants' success in impeding plaintiffs' activities may have been considered by the jury to be more an indication of the special determination and discipline of the plaintiffs than of the skill, or absence of skill, of defendants in executing their plans.[12] Nevertheless, these awards would amount to far more than a year's compensation for the average person employed in the Washington area. Even making an allowance for the intangibility of the injuries the jury attempted to compensate and the high value our society places on freedom of expression, the awards border on the extravagant. *Cf. Tatum v. Morton, supra*. Each plaintiff may recover compensatory damages only for his or her own actual injuries. *Carey v Piphus, supra; cf. Dellums v. Powell, supra*, 184 U.S.App.D.C. at 317-318, 566 F.2d at 209-10 (Leventhal, J., concurring).

In appraising these verdicts under the restraints imposed upon a trial judge the Court has also considered, to paraphrase Dellums, whether the liability of each individual defendant may be "totally out of proportion to any harm" that the individual defendant caused. *Cf. Dellums v.*

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[12] The Court is convinced that, in fixing the awards it did, the jury was not influenced by the kind of passion or prejudice that would require automatic invalidation of the verdicts. *Cf. Butts v. Curtis Publishing Co.*, 351 F.2d 702, 717 (5th Cir. 1965), *Aff'd*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

Powell, supra, 184 U.S.App.D.C. at 304, 566 F.2d at 196. If the standards extrapolated from the District Court and Court of Appeals decisions in *Dellums* and *Tatum* were applied to the liability of the individual defendants here, the large verdict against each defendant might well be disproportionate to the harm caused by that defendant. These liabilities range up to about $75,000 in the case of defendant Brennan. The financial burden imposed by these verdicts upon government officials, and particularly retired ones, is heavy indeed. From their perspective it is difficult to say that the payments they are called on to make are commensurate with the harm the jury found that they caused personally. The actions which caused the injuries found by the jury occurred long ago and may be thought by some to be cured in substantial measure by time and by the very fact that the jury has heard the case and decided it for the plaintiffs against the defendants. Furthermore, plaintiffs suffered no financial loss against which defendants' financial burden can be compared. If in this case there were no restraints on the Court's prerogative and it could substitute its judgment for that of the jury, the Court would hold that the compensatory damage liability visited upon each defendant should be from ten (10) to twenty (20) percent of what the jury awarded. However, each defendant had some supervisory role, so that each shared responsibility for actions of other actors. More important, they were conspirators and shared responsibility for actions of a large number of co-conspirators. There is an inevitable inequity resulting from the fact that not all of the conspirators (possibly not even the principal conspirators) share proportionately in the financial burden of compensating these plaintiffs for injuries caused in part by co-conspirators. The law is such that a principal is responsible for his subordinate's actions in the circumstances here, and a co-conspirator is responsible for the actions of the conspiracy. This principle had to be applied in this case to make these defendants liable for injuries that

other persons may have joined in causing without personal financial loss to themselves. *See generally 1 F. Harper & F. James, The Law of Torts* § 10.1 (1956); *W. Prosser, Handbook of the Law of Torts* 297 (4th ed. 1971); *see also id.* at 313-23.[43]

In view of the foregoing the Court has considered very carefully whether these considerations require, or permit a new trial or proposal of a remittitur of a substantial percentage of the compensatory damages. The jury was given instructions that followed, as closely as possible, the guidelines established by the Court of Appeals for compensation of First-Amendment injuries. Only by finding that the jury simply valued too high these plaintiffs' First-Amendment rights could the Court disturb the verdicts. Such a finding can be made only if it appears from all the evidence at trial that "the 'verdict is so unreasonably high as to result in a miscarriage of justice,' or . . . 'so inordinately large as obviously to exceed the maximum limit of a reasonable range within which a jury may operate.'" *Taylor v. Washington Terminal Co.*, 133 U.S.App.D.C. 110, 113-14, 409 F.2d 145, 148-49 (1969) (*Quoting Frank v. Atlantic Greyhound Corp.*, 172 F.Supp. 190, 191 (D.D.C. 1969) *and Grading v. Reilly*, 214 F.Supp. 234, 235 (D.D.C. 1963)). Though the question is a close one, in light of the burden on defendants, the Court cannot say that the compensatory awards to the eight prevailing plaintiffs can, under the *Taylor* standard, be set aside for excessiveness. Similarly the Court cannot say that the distinction in the verdicts between the five plaintiffs recovering one sum and the three recovering another sum impeaches the jury's work. Nor can the Court accept the District of Columbia's argument that the damages against itself were so extraordinary as to be excessive, even if the other awards were

[43] Nothing decided here precludes any claim over for contribution against other co-conspirators or aiders or abettors or their estates.

not.[44] So the Court concludes, with considerable reluctance, that whatever it might have ruled as a trier of fact, it is bound to leave undisturbed the jurors' decision on the measure of compensatory damages awarded in this constitutional tort and conspiracy case.[45]

B. Punitive Damages

Punitive damages, assessed over and above the amount needed to compensate the injured party, are intended to punish the wrongdoer and to deter him and others from similar misconduct in the future. *See City of Newport v. Fact Concerts, Inc., supra*, 101 S.Ct. at 2759 (1981). In this case the jury awarded substantial sums in punitive damages against the five FBI defendants, former Chief Wilson, and former Inspector Herlihy. Each of those defendants now challenges the punitive awards.[46]

The standard for award of punitive damages is simple: "[t]he tort must be 'aggravated by evil motive, actual malice, deliberate violence or oppression.'" *Nader v. Alle-*

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[44] The District may well have been held liable for injuries inflicted on plaintiffs by persons other than the individual MPD defendants named in this action. Such a result would not have been implausible under the *Monell* rule, or unreasonable given the evidence in this case. The Court has considered, and rejected, the possibility that the jury erroneously awarded punitive damages against the District under the guise of compensatory damages.

[45] There is simply no basis for assuming, as the FBI defendants have, that the verdicts are erroneous because they resulted in awards of the same amounts against defendants Jones and Pangburn. Whether the two were responsible for the same *quantum* of plaintiffs' injuries is a question proper for the trier of fact, and the jury's result was scarcely so self-evidently irrational as to permit the Court to set the verdicts aside.

[46] The parties did not brief the *City of Newport* case, and it was not until after the case had been submitted to the jury that the Court discovered the case. Consequently the Court erred in giving instructions that would have permitted a punitive award against the District of Columbia. *See* 101 S.Ct. at 2762. The error was harmless, however, because the jury made no punitive award against the District government.

gheny Airlines, 167 U.S.App.D.C. 350, 372, 512 F.2d 527, 549 (1975), *rev'd on other grounds*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976) (*quoting Black v. Sheraton Corp. of America*, 47 F.R.D. 263, 271 (D.D.C. 1969)). The evidence supported a finding by the jury that the FBI defendants—each of whom asserted a "good faith" immunity defense which the jury rejected—deliberately sought to oppress plaintiffs in the exercise of their First-Amendment rights. There was evidence that the FBI defendants acted with zeal, initiative, and resourcefulness in a campaign of deliberate disruption of lawful protest over a long period. They attempted and effected unlawful restraints on political association for the purpose of political expression. Their conduct violated clear commands of the Constitution as it has been repeatedly and authoritatively interpreted and enforced by the Supreme Court.[46] "It is fundamental that the trier of fact may find malice by drawing inferences from the defendant's conduct. These deductions are findings of fact and are subject to the clearly erroneous standard." *Nader v. Allegheny Airlines*, *supra*, 167 U.S.App.D.C. at 374, 512 F.2d at 551. With respect to the FBI defendant, the Court is convinced that there was ample evidence for an award of punitive damages.

The question then becomes, with respect to the five FBI defendants, whether the awards were excessive. *See Afro-American Publishing Co. v. Jaffe*, 125 U.S.App.D.C. 70, 83, 366 F.2d 649, 662 (1969) (en banc); *Central Armature Works v. American Motorists Ins. Co.*, 520 F.Supp. 283, 296 (D.D.C. 1980). In a case of this type, in which plaintiffs have an independent statutory basis for recovery of attorneys' fees, punitive damages obviously have no role in compensating them for the costs of litigation. *Cf. Central Armature Works v. American Motorists Inc. Co.*, *supra*. Nor is these

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[46] *See, e.g., Healy v. James*, 408 U.S. 169, 181, 92 S.Ct. 2338, 2346, 33 L.Ed.2d 266 (1972); *NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963).

a "profit" wrongfully obtained by the defendants in this case that should be disgorged through the punitive award. *Id.*[47] The sole functions of the punitive damages the jury awarded in this case were to punish and to deter. The Court cannot say that the awards the jury made, substantial as they were, were "larger than should be condoned in simple justice." *Afro-American Publishing Co. v. Jaffe, supra*, 125 U.S.App.D.C. at 84, 366 F.2d at 663. Confronted with the evidence in this case, the jury could well have decided, in the exercise of calm and dispassionate reason, that the sums if fixed as punitive damages against the FBI defendants were required as a sanction for those defendants' conduct and to ensure that such conduct would not be repeated in the future.

The punitive awards against the two MPD defendants, however, stand on different footing. The jury has broad discretion in determining whether to award punitive damages, and in assessing the amount of punitive damages. *See City of Newport v. Fact Concerts, Inc., supra*, 101 S.Ct. at 2761. But despite the convincing proof of their participation in conspiracies among themselves and with the FBI defendants, the evidence will not support the punitive awards against the former MPD officers. Although there was evidence that the MPD defendants acted with a bad intent, there is no basis, in the evidence against them, for believing that a punitive award is required to deter similar conduct by MPD officers in the future. COINTELPRO was an FBI activity. The FBI defendants were among its instigators and its leaders. There is no evidence that the key FBI directives, with their call for initiatives to disrupt plaintiffs' associations, embraced the MPD defendants.[48] Deterrence of the FBI defendants could reasonably be

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[47] The fact that others responsible for damages caused by the conspiracy did not pay their share, cannot be weighed here.

[48] *See* Plaintiffs' Exhibits 1-3.

expected to effect deterrence of all defendants and those who participated with them without imposition of separate punitive damages on MPD defendants. Though willing participants in the program to disrupt plaintiffs' activities, the MPD defendants followed the lead of the federal officers in many instances, and appear sometimes simply to have relied unreasonably on their own assumptions about the requirements of public order. However unreasonable a defendant's conduct may have been under the circumstances that confronted him, gross negligence will not justify a punitive award. *Chesapeake & Potomac Telephone Co. v. Clay*, 90 U.S.App.D.C. 206, 194 F.2d 888 (1952); *see also Nader v. Allegheny Airlines, supra.* And some evidence of bad intent—enough in this case amply to support the conspiracy verdicts—cannot alone support a punitive judgment unless such an award seems required to deter future misconduct. Whether it is called compensatory or punitive, the whole award granted to a plaintiff and against a defendant in a public action like the present one has a deterrent function. *See Owen v. City of Independence, supra*, 100 S.Ct. at 1416. Considering the evidence in a light most favorable to plaintiffs' claim for punitive damages, but also bearing in mind the jury's sizeable compensatory awards, the Court has concluded that the punitive judgment against defendants Wilson and Herlihy was not supported by the evidence. Wilson and Herlihy accordingly will have judgment n.o.v. on the punitive damages issue. *Cf. Afro-American Publishing Co. v. Jaffe, supra.*

IX. Conclusion

An accompanying Order will grant the motions of defendants Wilson and Herlihy for judgment notwithstanding the verdicts assessing punitive damages against them, and deny all other motions. Plaintiffs' prayer for injunctive relief remains under advisement.

ORDER

For the reasons stated in the accompanying Memorandum, it is this 31st day of May 1982 hereby

ORDERED: that the motion of the federal defendants for judgment notwithstanding the verdict or for a new trial be denied; and it is further

ORDERED: that the motion of the District of Columbia defendants for judgment notwithstanding the verdict assessing punitive damages against defendants Wilson and Herlihy be granted; and it is further

ORDERED: that the motion of the District of Columbia defendants for judgment notwithstanding the verdict assessing punitive damages, be denied.

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2159

JULIUS HOBSON, et al.

v.

JERRY WILSON, THOMAS J. HERLIHY, JACK ACREE, CHRISTOPHER SCRAPPER, EDWARD JAGEN, JOHN MAHANEY & GEORGE SUTER, APPELLANTS

JOHN B. LAYTON, et al.

No. 82-2160

JULIUS HOBSON, et al.

v.

JERRY WILSON, et al.
CHARLES D. BRENNAN, COURTLAND J. JONES, GERALD T. GRIMALDI, GEORGE C. MOORE & GEROULD W. PANGBURN, APPELLANTS

No. 82-2221

JULIUS HOBSON, et al.

v.

JERRY WILSON, et al.
DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION, APPELLANT

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 82-2226

JULIUS HOBSON, et al.
WASHINGTON AREA WOMEN STRIKE
FOR PEACE, APPELLANT

v.

JERRY WILSON, et al.

No. 82-2227

JULIUS HOBSON, et al.
ABE BLOOM, ARTHUR I. WASKOW, TINA HOBSON,
DAVID EATON, SAMMIE A. ABBOTT,
RICHARD P. POLLOCK, REGINALD BOOKER,
WASHINGTON PEACE CENTER and
WASHINGTON AREA WOMEN STRIKE
FOR PEACE, APPELLANT

v.

JERRY WILSON, et al.

On Petition for Rehearing

(Civil Action No. 76-1326)

Filed August 17, 1984

Richard K. Willard, Acting Assistant Attorney General, United States Department of Justice, *Joseph E. diGenova*, United States Attorney, *Barbara L. Herwig* and *Freddi Lipstein*, Attorneys, United States Department of Justice, were on the petition for rehearing with suggestion for rehearing *en banc* on behalf of appellants Brennan, Moore, Pangburn and Grimaldi.

Before: EDWARDS, SCALIA and STARR, *Circuit Judges*.

ORDER

On consideration of the petition for rehearing of Appellants Brennan, Moore, Pangburn and Grimaldi, filed July 23, 1984, it is

ORDERED, by the Court, that the petition is denied.

A statement of the Court is attached.

Per Curiam

We deny the petition for rehearing in this case. Two points raised by the FBI defendants in their petition, however, merit comment. The FBI defendants' principal argument is that it is unjust to find mid- and low-level government officials liable for conspiracy when they merely participated in an illegal program approved by higher authorities. In this case, however, the defendants found liable by the jury (and whose liability has been sustained) could only have been found to have participated in the conspiracy, if at all, in a supervisory capacity, exercising substantial responsibility for developing and implementing a policy knowingly designed to thwart plaintiffs' exercise of their First Amendment rights. We are simply not dealing with federal agents who were acting without knowledge of or responsibility for the illegal objective of a government program, and we need not and do not hold that such agents may be held liable under a conspiracy theory.

Second, the FBI defendants argue for the first time that compliance with an agency's approved policy should be deemed one of the "extraordinary circumstances" (as yet undefined) giving rise to immunity under *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). In its most extreme form, this argument amounts to the contention that obedience to higher authority should excuse disobedience to law, no matter how central the law is to the preservation of citizens' rights. We have no hesitation in rejecting this new argument.

In this case, we had no occasion to consider and we therefore did not address, the contention that in some circumstances compliance with approved policy, such as compliance only after protesting the policy at issue, could excuse liability. Appellants have never raised and, indeed, the record could not support any such contention. We thus leave open the question whether the "extraordinary circumstances" prong of *Harlow* is satisfied under circumstances not presented by this case.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 76-01326

No. 82-2159

JULIUS HOBSON, *et al.*,

v.

JERRY V. WILSON,
THOMAS J. HERLIHY,
JACK ACREE,
CHRISTOPHER SCRAPPER,
EDWARD JAGEN,
JOHN MAHANEY &
GEORGE SUTER,

Appellants.

JOHN B. LAYTON, *et al.*

And Consolidated Cases

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

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FILED
United States Court of Appeals
For the District of Columbia Circuit
August 17, 1984
GEORGE A. FISHER
Clerk

ORDER

The suggestions for rehearing *en banc* of Appellants (Brennan, Moore, Pangburn and Grimaldi) and of Appellees have been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestions for rehearing *en banc* are denied.

For the Court:
GEORGE A. FISHER, Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Tamm, Ginsburg and Bork did not participate in this order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 76-01326

No. 82-2159

JULIUS HOBSON, *et al.*,

v.

JERRY V. WILSON,
THOMAS J. HERLIHY,
JACK ACREE,
CHRISTOPHER SCRAPPER,
EDWARD JAGEN,
JOHN MAHANEY &
GEORGE SUTER,

Appellants.

JOHN B. LAYTON, *et al.*

And Consolidated Cases

BEFORE: Edwards, Scalia and Starr, Circuit Judges

FILED
United States Court of Appeals
For the District of Columbia Circuit
August 17, 1984
GEORGE A. FISHER
Clerk

ORDER

On consideration of the motion of Courtland J. Jones for leave to file petition for rehearing, it is

ORDERED by the Court that the motion is granted, the Clerk is directed to file the lodged petition and, upon consideration of the petition for rehearing, it is

FURTHER ORDERED by the Court that the petition is denied.

Per Curiam
For the Court:
GEORGE A. FISHER, Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

NO. 84-1139

Office - Supreme Court, U.S.
FILED
MAR 5 1985
ALEXANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES D. BRENNAN, GERALD T. GRIMALDI, COURTLAND J. JONES, GEORGE C. MOORE and GEROULD W. PANGBURN,

Petitioners,

vs.

TINA HOBSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether federal officials should be given blanket immunity for their intentional and knowing violation of First Amendment rights simply because their actions were carried out with the approval of higher federal officials in the FBI.

2. Whether a conspiracy by federal officials to discredit black leaders, to thwart the development of new black leaders, and to prevent the coalition of black and white civil rights and peace groups can reasonably be considered a purely politically-motivated conspiracy and not race-oriented.

3. Whether the jury was properly instructed and there was sufficient evidence to sustain its conclusion regarding the entitlement of these FBI officials to official immunity for the injuries they caused.

4. Whether there was sufficient evidence to support the finding that these defendants or their co-conspirators, acted to deliberately conceal from the plaintiffs the tort being committed.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1139

CHARLES D. BRENNAN, GERALD T. GRIMALDI, COURTLAND J. JONES, GEORGE C. MOORE AND GEROULD W. PANGBURN,

Petitioners,

v.

TINA HOBSON, et al.,

Respondents.

COUNTER-STATEMENT

This case began nine years ago when a number of Washington, D.C. anti-war and civil rights activists became concerned, as a result of revelations in the press and in congressional hearings, that their organizations had been the targets of a previously secret FBI operation known as COINTELPRO (counterintelligence program).

COINTELPRO was not a law enforcement program. Its goal, explicitly stated in

internal FBI documents, was "to expose, disrupt and otherwise neutralize the activities" of those opposed to the U.S. involvement in Vietnam, loosely termed the New Left, and "to expose, disrupt, misdirect, discredit, or otherwise neutralize the activities of black nationalists," a term the FBI employed broadly to include virtually any outspoken black civil rights activists.

While these general goals were revealed in congressional investigations held in 1975 and 1976, it remained to be proven what actual harm had been done to the plaintiffs politically active in Washington, D.C. in the peace and civil rights movements. This lawsuit was filed in July, 1976.

Several years of discovery ensued in which plaintiffs tried to obtain their FBI files in order to learn what tactics had been employed against them and who

was responsible. Understandably, the defendants resisted every effort to obtain documentary evidence not already public, claiming the state secret or informer's privilege for large portions of the FBI files on plaintiffs. After taking many depositions, plaintiffs eventually were able to identify those key officials in the headquarters or field office of the FBI who had primary responsibility for the execution of COINTELPRO activities against them. Other agents, whose involvement was only peripheral, were dismissed voluntarily before trial.

Those FBI officials who remained as defendants at the time of trial were not, therefore, arbitrarily selected to serve as scapegoats for the "sins of the many" (Pet. Brief at 7) but were each centrally involved. Brennan and Moore, for example, were the national directors of

COINTELPRO actions against the New Left and black "nationalists." They had authority to approve or disapprove specific proposed counterintelligence tactics. Jones had similar authority for the entire Washington, D.C. field office; he was the liaison between headquarters and local efforts. Grimaldi and Pangburn were top agents in the "New Left" and "black nationalists" squads in the Washington field office. They were in charge of the informers sent in to "disrupt and discredit" plaintiffs' organizations and helped plan and execute specific operations directed at plaintiffs.

During a three-week jury trial, at which over 30 witnesses testified and hundreds of pages of documentary evidence, largely internal FBI memoranda, were introduced, the FBI defendants attempted to minimize their personal

involvement, explaining away their signatures on key documents as mere formalities. Some effort was made to justify COINTELPRO as an effort to prevent violence but this failed utterly as the evidence revealed that far from preventing violence, the defendants had hoped to incite violence and confrontation. Among the actions directed at plaintiffs were the following:

> -- the printing and circulation of a forged racially inflammatory leaflet designed to set the black groups against the white groups;
>
> -- the deliberate disruption of radio communications at a lawful demonstration so that peace parade marshals would have trouble directing the crowd;
>
> -- forging false housing forms used by plaintiffs to provide overnight lodging to out-of-town peace marchers so that visitors were sent to non-existent addresses.

The defendants acknowledged that these and other actions were directed at disrupting plaintiffs' groups which were known to be peaceful and events for which

permission had been obtained but justified such "counterintelligence" activity on the grounds that even a peaceful, lawful demonstration provides an opportunity for violence.

After deliberating for several days, the jury rendered its verdicts on detailed special verdict forms reviewed by all parties. The jury excused some metropolitan police defendants on immunity and statute of limitations grounds but returned verdicts against all other defendants in favor of eight of the nine plaintiffs. The amount of compensatory and punitive damages awarded varied among the parties and reflected the evidence.

The verdicts were then subject to careful scrutiny by the trial court in acting on post-trial motions for judgment notwithstanding the verdict. In a lengthy opinion the trial court found there was sufficient evidence to sustain

all findings of liability but reversed the award of punitive damages against the two top-ranking metropolitan police defendants, saying their negligent failure to safeguard against constitutional abuses was not enough to warrant punitive damages.

The issue of official immunity, the relevance of Harlow v. Fitzgerald, 457 U.S. 800 (1982), the finding of conspiratorial liability, the instructions and evidence on the statute of limitations -- in short, all the issues raised here -- were first addressed in the District Court's post-trial decision.

These issues were again revisited, even more thoroughly, by the Court of Appeals in a unanimous panel decision (Judges Edwards, Scalia and Starr) over 100 pages in length. The Court of Appeals reversed the District Court on the sufficiency of the evidence against

the metropolitan police defendants and overturned the awards against three plaintiffs on statute of limitations grounds but it had no hesitation in affirming the finding of liability against the five FBI petitioners.

Having failed twice to set aside the verdicts on the grounds of insufficient evidence, the FBI defendants sought rehearing and hearing en banc saying for the first time that even if they were personally responsible they had been acting pursuant to orders from superiors within the FBI and should be completely immune on the "superior orders" defense. The Court of Appeals, in denying rehearing or hearing en banc to both sides, wrote a per curiam decision taking special note of the above argument and rejecting it on both factual and legal grounds. This petition then followed.

REASONS FOR DENYING THE WRIT

The record in this case presents dramatic facts and colorful parties but the legal issues involved are routine doctrines of tort and evidentiary law in the context of an action for damages for injury to First Amendment rights. All of the arguments raised by petitioners have already been carefully considered and rejected below both by the trial court, by the panel of the Court of Appeals and again in an unreported *per curiam* decision denying the FBI defendants' motion for rehearing *en banc*.

Arguments below, both post-trial and again on appeal, centered on questions of fact: the sufficiency of the evidence to show each defendant's involvement in an improper scheme to thwart First Amendment rights and the facts surrounding the statute of limitations, *viz*. to what extent were plaintiffs actually deceived

by the FBI defendants' efforts at secrecy. In an effort to cast these difficult but traditionally not "cert"-worthy matters in a significant light, the petitioners have gravely overstated and, in some instances, misconstrued the proceedings below.

I

THE JURY'S FINDING OF CONSPIRATORIAL LIABILITY FOR EACH OF THE PETITIONERS WAS BASED ON SPECIFIC INSTRUCTIONS REQUIRING PROOF OF INDIVIDUAL KNOWLEDGE AND PARTICIPATION AND WAS PROPERLY AFFIRMED BY ALL COURTS BELOW. THERE WAS NO OBJECTION BELOW TO THE JURY INSTRUCTIONS

The petitioners' suggestion that their liability in this case rests on a finding that COINTELPRO was a conspiracy and they were liable merely as FBI employees assigned to the program is simply wrong. (See jury instructions, Appendix.) Nowhere does the District Court or the Court of Appeals characterize COINTELPRO as an ipso facto

conspiracy. The District Court took great pains to instruct the jury that it had to find that each defendant had been aware of a plan to thwart First Amendment rights and had acted in furtherance of the improper goal. Contrary to the petitioners' assertion (Pet. Brief at 7), the jury was instructed that agreement ("a meeting of the minds") was necessary as to each individual defendant to find liability.

Moreover, the trial court specifically instructed the jury that the fact the defendants were employed at the FBI was "not, standing alone, proof of a conspiracy. . .". (Pet. Brief,App. 146a.) The testimony and documentary evidence during the three-week trial was very much directed at establishing the particular involvement of each defendant in the clearly unlawful aspects of COINTELPRO, at showing their involvement

in planning, approving and executing what petitioners gingerly describe as the "excesses" of the program.

No defendant objected to the jury instructions on conspiratorial liability which followed long-established law.

What the FBI petitioners are actually seeking here is an opportunity to argue that <u>despite</u> their personal and knowing participation in a clearly unconstitutional adventure, they should be held harmless. In effect, they seek absolute immunity for personal and knowing participation in an unlawful conspiracy.

The position of the FBI defendants during trial was quite different from their position here. At trial, the FBI officials denied as a matter of fact any personal involvement in COINTELPRO, at least as if effected these plaintiffs. It was only after trial and the appeal,

when their denials were unavailing, that the defendants first raised in their motion for rehearing en banc their "superior orders" or Eichmann defense. The Court of Appeals, in its per curiam decision denying rehearing, noted this change in position and commented:

> In its most extreme form, this argument amounts to a contention that obedience to higher authority should excuse disobedience to the law, no matter how central the law is to the preservation of citizens' rights. We have no hesitation in rejecting this argument.

(Pet. Brief, App. 198a.) In addition, the Court also noted, these federal agents were certainly not without responsibility for the illegal aspects of the program.

II

THE DEFENSE OF OFFICIAL IMMUNITY WAS CONSIDERED FOR EACH DEFENDANT UNDER PROPER INSTRUCTIONS AND THE JURY'S FINDINGS OF LIABILITY HAVE BEEN CAREFULLY REVIEWED AND AFFIRMED

The petitioners' arguments regarding the treatment of the immunity defense (Pet. Brief 11-15) are really a restatement of the same complaint made in regard to their conspiracy liability. They claim that they were deprived an individualized determination of their right to official immunity but they cite no jury instruction or jury finding to support this surprising assertion. The jury forms, although not included in petitioners' Appendix, are reproduced as an appendix to the trial court's decision in the published decision at 556 F.Supp at 1196 and clearly show that the special verdict form required individual determination as to the immunity of each defendant. So did the jury instructions.

(App., A2.) Indeed, the jury excused some defendants on immunity grounds. (Pet. Brief, App.. at 165A-166A, n. 31.)

If the Court of Appeals opinion speaks of the defendants as a group it is simply for convenience because their defenses were the same, not because the court made some improper collective analysis of immunity. Similarly, the decisions below discuss the nature of the FBI's COINTELPRO not because either court believed immunity is granted vel non to a particular government program, but because the defendants chose to defend their actions by pointing to what they claimed were the legitimate and benign goals of COINTELPRO -- to prevent violence by opponents of government policy.

To counter this defense and to establish as a matter of fact that the defendants, individually, had to have known such was not the primary purpose of

COINTELPRO, the plaintiffs introduced documents, many signed by these defendants, stating that the purpose of COINTELPRO was to disrupt and neutralize group which the defendants knew were peaceful. Thus the nature of COINTELPRO was an important issue of fact.

It is a misconstruction of the record to suggest as petitioners do that the FBI defendants' immunity turned solely on the nature of COINTELPRO. Although obviously that was a relevant factual consideration, the key issue was each defendant's knowledge of and participation in its improper activities. The individualized determination of this issue was made by the jury and decided against them.

III

THE RECORD BELOW AMPLY DEMONSTRATES A CONSPIRACY DIRECTED AT BLACK CIVIL RIGHTS GROUPS AND AT WHITE GROUPS ATTEMPTING TO FORM A COALITION WITH THEM AND THUS FALLS SQUARELY WITHIN THE CORE OF 42 U.S.C. 1985(3) REGARDLESS OF WHETHER THE CONSPIRACY IS LABELED "POLITICAL" OR "RACIAL" IN ITS MOTIVATION

The objection the petitioners are now making to the wording of the jury instruction on section 1985(3) conspiracy liability -- the use of the word "political" rather than "racial" to describe the animus -- was never made at trial and hence must be deemed waived under Fed. R. Civ. Pro. 51. It was not made at trial for a very simple reason: it made no difference in this record whether the animus was described as political or racial since the political thrust was rooted in racial animus.

Racial animus informed the FBI officials' methods and goals. Defendants

Jones and Moore approved false press releases for distribution which were sent out to "friendly media" sources and were intended "to tarnish the reputation of Julius Hobson," a local black civil rights leader and late husband of respondent Tina Hobson. The press releases portrayed Hobson as an "Uncle Tom" and were designed, according to FBI interoffice memo, to "cause Black leaders to view each other with suspicion." (Pltf. Trial Exh. 21-2.)

FBI documents introduced at trial and either written or approved by defendants explicitly stated that the goal was to prevent a coalition from forming between local black civil rights groups and the peace movement. To this end, for example, defendants Brennan and Moore approved a scheme to foster racial animosity between the two camps by sending a forged letter to the local

leader of the November, 1979 peace marches saying the black community of Washington, D.C. "demands" payment of $25,000 as the price for its support for the march.

The defendants then prepared what purported to be the response of the predominately white peace movement leaders and mailed it to key local blacks. On a paper bearing a crude drawing of a black monkey with a banana, the leaflet said in part:

> [If] you must get something in return for their non-violence towards the NMC [the peace organization] during these days of demonstration, give them BANANAS -- all they can eat. . .We consider you [a local black leader] and your kind as black bandits and the most dangerous of the elements eating away at the movement. The Steering Committee of the NMC can feed you all the shit they want, Mr. Moore, but lip service isn't money. None that you'll ever see. Suck on your bananas, brother, and some day you might learn how to make a fire or build a wheel.

The record in this case is replete with similar instances of efforts to discredit black leaders qua blacks and to stir up racial hatred.

While it is correct that the term "political purposes and activities" was used in the jury instructions, rather than "political or racial," it was used without objection by any defendant. United Brotherhood of Carpenters and Joiners v. Scott, 103 S.Ct. 3352 (1983), questioned in dicta whether a purely politically-motivated conspiracy, as distinguished from one with an underlying racial animus, as in this case, could be actionable under 42 U.S.C. §1985(3).[1] It

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[1]In fact, United Brotherhood effected no change in the law regarding racially-motivated conspiracies or conspiracies, such as here, where racial and political animus are interwoven. See Griffin v. Breckinridge, 403 U.S. 88 (1971). United Brotherhood dealt with a

(Footnote Continued)

is on this dicta, inapplicable in any event to the facts here, that petitioners rely.

This entire issue was thoroughly treated by the Court of Appeals below which found that the racial overtones of the FBI program were so strong that the facts fit "solidly within even the narrowest reading of section 1985(3)." (Pet. Brief, App. 40a.) There was, therefore, no conceivable prejudice, nor do petitioners claim any, in the use of the term "political" rather than "racial" in describing the motivation for the animus.

IV

THE APPLICATION OF THE STATUTE OF LIMITATIONS PRESENTS FACTUAL QUESTIONS PROPERLY DECIDED BELOW AND INVOLVED NO IMPORTANT FEDERAL QUESTION

(Footnote Continued)
conspiracy among private parties which had at its base animus neither racial nor political but economic.

The petitioners raise two issues with respect to the application of the statute of limitations to this case. First they claim that the courts below did not follow Wood v. Carpenter, 101 U.S. 135 (1879), an early decision of this Court with regard to the proof necessary to show fraudulent concealment. (Pet. Brief at 22). Neither issue warrants granting certiorari; both were exhaustively treated below.

Wood v. Carpenter found no fraudulent concealment in the acts of a judgment-debtor to convey his property beyond the reach of his judgment creditor where the real estate conveyances were recorded in the public registry. Although the judgment-debtor kept quiet about the conveyances until his judgment-creditor tried to execute his judgment (some 12 years after getting judgment, a fact the Court found significant), the Court held

that in such a case "mere silence" is not enough to give rise to fraudulent concealment and toll the limitations period. The fraud in Wood had not really been concealed.

It should be clear from this brief explanation of why Wood does not govern this case as the court below properly held. The facts here involve not "mere silence" about otherwise discoverable facts but instead active and deliberate concealment; viz: the use of unwatermarked paper to send inflammatory letters, telephone calls to plaintiff's employers made under assumed identities, explicit caveats in virtually every approved COINTELPRO plan to make sure the project could not be traced to the Bureau, and attendance at plaintiffs' meetings under false identities. (Pet. Brief, App. 66a-67a.)

In light of this record, the trial court properly declined to give a requested instruction that "mere silence" by a defendant is not fraudulent or deliberate concealment because the evidence did not generate the basis for such an instruction and it would have confused the jury.

Contrary to petitioners' assertion that the plaintiffs were not required to show affirmative acts of concealment, the trial court specifically instructed the jury that it had to find "deliberate concealment" meaning "that defendant or a conspiracy to which a defendant belonged deliberately kept information away from a plaintiff which was material to that plaintiff's claim." (Jury instructions quoted in part at Pet. Brief, App. 156.) The Court of Appeals thoroughly considered this very issue and found not "mere silence" about a self-concealing

wrong, as petitioners claim, but ample evidence of affirmative acts taken during the conspiracy itself to assure that the plaintiffs would remain ignorant not only of who was working against them but also of what exactly was being done. The whole point of the defendants' actions was to make the plaintiffs believe the disagreements and difficulties they were experiencing were internal and to turn the plaintiffs against each other.

Petitioners claim of novelty for the Court of Appeals' decision, clearly intended to alarm, is based on an inaccurate description of the holding. Neither court below ever held that the limitations period was tolled until plaintiffs were "given notice" of the conspiracy. What the courts below held, in accord with established law, was that the plaintiffs had the burden of showing deliberate concealment of material facts

which prevented their filing suit earlier and, if that difficult hurdle was surmounted, then the defendants could try to show that despite the concealment, plaintiffs could have with due diligence discovered the facts necessary to sue.[2]

The holding hardly allows the plaintiffs to sleep on their claims until

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[2] Gruenwald v. U.S., 353 U.S. 391 (1957), on which petitioners rely heavily, is clearly inapposite. It does not involve the doctrine of fraudulent concealment. It was a criminal case in which the Court, for policy reasons, declined to extend the already sweeping scope of the conspiracy doctrine to include as part of the conspiracy acts of concealment taken after the crime itself had been completed. Since all crimes are committed in secret and efforts at concealment are the rule, the Court required proof that the agreement to continue to conceal had been a part of the original conspiratorial intent in order for criminal responsibility to attach. Civil wrongs, on the other hand, are not necessarily hidden but when the cause of action itself has been concealed, the statute is tolled. Richards v. Mileski, 662 F.2d 65 (1981); Fitzgerald v. Seamens, 553 F.2d 220 (1977).

notice is given them. Evidence of this is the fact that the Court of Appeals reversed the judgments in favor of three plaintiffs on the grounds that they had, as a result of reading a newspaper article about FBI COINTELPRO activities, had to sue, despite the fact that efforts at concealment and denial continued after the article appeared.

CONCLUSION

For the foregoing reasons, the respondents respectfully urge the Court to deny the petition for certiorari.

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APPENDIX

EXCERPTS FROM JURY INSTRUCTIONS RELATING TO NECESSITY FOR INDIVIDUALIZED DETERMINATION FOR EACH DEFENDANT

...Now, in this case, as you know, there are several plaintiffs and several defendants. The case of each is separate from and independent of that of the other. The law permits them to join as plaintiffs here solely because their claims involve the same subject matter. However, their rights, if any, are separate, not joined. The instructions I give you apply equally to each plaintiff unless otherwise stated, and you will determine each plaintiff's case independently and as a separate action and return a separate verdict in each case for the plaintiff and for the defendants. This will be reflected in, as I think I told you -- there will be a verdict form, a separate verdict form, for each plaintiff on which there are listed all the defendants.

You are instructed that while there are a number of defendants in this action, it does not follow that if one is liable, all the rest are liable, or any of the rest are liable. Each is entitled to a fair consideration of his or her own defense, and it is not to be prejudiced by the fact, if it should become a fact, that you may find against one or the other of them. The general instructions I give you govern the case as to each defendant to the same effect as if that defendant were the only defendant in the case.

If you find that no defendant is liable, your verdict should be in favor of all the defendants against the plaintiffs. If you should find that only one defendant is liable, then your verdict should be in favor of the plaintiff against that defendant alone, and so forth.

...The plaintiffs here claim that the defendants injured rights guaranteed to the plaintiffs by the First Amendment of the United States Constitution to express freely their political views and attitudes, and to debate publicly issues, and to assemble publicly, and to petition the government for redress of grievances. These are among the so-called First Amendment rights, along with the freedom of the press and freedom of religion. The government and people working for the government may not interfere with these rights except under certain very limited conditions and in certain very limited ways. Therefore, the questions before you basically are whether the defendants, acting individually or as alleged co-conspirators -- a term that I will explain to you further -- injured a plaintiff by preventing that plaintiff from exercising, or by impeding that

plaintiff in the exercise, or rights guaranteed by the First Amendment to assemble at a particular time and place, or to associate with one or more persons generally to further political aims and to engage in political activity.

As I have stated, people working for the government may lawfully interfere with speech, assembly, and association that have a political purpose, but only in certain very limited conditions and in very limited ways. For example, government officials have a very important duty by using reasonable means to prevent domestic violence to persons and property; to prevent interruption of orderly activities of a community, such as traffic; to protect the nation from foreign enemies; and to investigate and prevent crime.

Defendants claim that if they committed the acts about which plaintiffs

claim, they did so for those purposes. It's necessary for you to decide, therefore, whether a reasonable person in a defendant's situation could believe reasonably that his conduct would not impede a plaintiff's exercise of First Amendment rights, or that in so impeding, the defendant was nevertheless acting with a reasonable good faith believe that his conduct was lawful.

Finally, if you find that a defendant's conduct injured a plaintiff's First Amendment rights, and that conduct was not justified, you must proceed to determine whether that defendant or the conspiracy, which you may find or may not find, but the conspiracy to which he allegedly belonged deliberately concealed from that plaintiff knowledge of important facts about that plaintiff's case in such a way that that plaintiff could not have discovered by the exercise of due

diligence enough facts to file a suit in court in the time allowed by the statute of limitations for filing a suit.

Office-Supreme Court, U.S.
FILED
MAR 15 1985
ALEXANDER L. STEVAS,
CLERK

(3)

No. 84-1139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES D. BRENNAN, GERALD T. GRIMALDI, COURTLAND J. JONES, GEORGE C. MOORE AND GEROULD W. PANGBURN,
Petitioners,

v.

TINA HOBSON, *et al.*,
Respondents.

Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents initially concede that all of the arguments in the Petition were raised and considered in the trial court and the court of appeals (Brief in Opp. at 11).[1] Although the appellate court rendered a

[1] "All of the arguments raised by petitioners have already been carefully considered and rejected below both by the trial court, by

(footnote continued on next page)

130-page opinion, respondents describe the case as involving only "routine doctrines" of law (*ibid.*). But after staking out this position, respondents immediately abandon it. They spend the rest of their time arguing—rather inconsistently—that the questions presented in the Petition are not fairly before the Court because they were not raised below (*see, e.g., id.* at 14, 18, 19, 26).

Much of what respondents say in this regard is either inaccurate or misleading. The questions presented in the Petition are ripe for review. As we discuss below, respondents have provided nothing that would justify denying the writ. The case comes to the Court bristling with issues of profound public importance, issues that most certainly warrant review by this Court.

1. The Petition raises a question of great significance regarding the law of conspiracy as applied to the federal civil service. In related contexts, this Court and the lower federal courts have held that a conspiracy cannot be found when in fact what exists is a program devised by a single policymaking body and carried out by the officers and employees of that institution (Pet. 7-8). That is the situation with respect to COINTELPRO, a nationwide law enforcement program formulated by the FBI and implemented by agents throughout the country who have, as result of the decisions below, been designated as co-conspirators.

(footnote cont.)

the panel of the Court of Appeals and again in the unreported *per curiam* decision denying FBI defendants' motion for rehearing *en banc*."

Respondents are silent in regard to the authorities we cited to support our contention. Rather than addressing these decisions, respondents seek to convince the Court that the conspiracy question is not properly presented (Brief in Opp. at 12-15). They have two points. Neither has any substance.

First, they claim that our arguments are irrelevant because the COINTELPRO was not viewed as a conspiracy in the courts below (*id.* at 13-14). Respondents are clearly wrong on this score. Their statement not only flies in the face of the court of appeals' opinion (*see, e.g.*, Pet. App. 35a, 36a, 54a, 66a, 105a), but also contradicts the position they consistently maintained throughout the course of this litigation.[2]

Respondents' other point is that it was not until after trial that the FBI defendants argued the conspiracy issue now raised in the Petition (Brief in Opp. at 13-15). This too is not accurate. The FBI defendants in their pretrial brief [3] and in their motion for a directed verdict objected on the ground that, as the district court put it, "employees working under a common direction of one institution and bound to-

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[2] Plaintiffs' counsel stated the matter succinctly: "COINTELPRO was a nationwide conspiracy." Pretrial Tr. 227, 227-30; *see* Pretrial Tr. 103-110. *See, e.g.*, Plaintiffs' Pretrial Brief, at p. 16 (plaintiffs intend to prove that the FBI conspiracy was "formally institutionalized . . . under the name Counterintelligence Program (COINTELPRO)"); Brief of Appellees and Cross-Appellants Hobson, *et al.*, at p. 12 ("The record demonstrates a multi-faceted conspiracy to obstruct plaintiffs' exercise of their rights. One part was the FBI's highly-structured secret program known as COINTELPRO. . . .").

[3] Pretrial Brief of Federal Defendants, at 19-20.

gether by their employer/employee relationship are not, by cooperating, engaging in conspiracy." [4] Indeed, the FBI defendants' pretrial brief relied upon then-Judge Stevens' opinion in *Dombrowski* v. *Dowling,* 459 F.2d 190 (7th Cir. 1972),[5] which the Petition also quotes (at p. 8).[6]

2. The Petition raises the question whether politically motivated conspiracies are actionable under 42 U.S.C. § 1985(3) (Pet. 9-11), a question this Court reserved in *United Brotherhood of Carpenters and Joiners* v. *Scott,* 103 S.Ct. 3352, 3359-3360 (1983), after noting the far-reaching consequences such a doubtful interpretation would entail. Respondents counter that petitioners waived any objection because their argument "was never made at trial" (Brief in Opp. at 19).

We presume respondents' mistake is inadvertent. The record shows that petitioners raised the Section 1985(3) issue prior to trial, only to have their position rejected by the district court in its ruling *in limine.*[7]

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[4] Tr. 255 (Dec. 9, 1981) ; *see also id.* at 252-254.

[5] Rather than attempting to explain why the analysis in *Dombrowski* v. *Dowling, supra,* should not control here, respondents seek to divert attention from this important question of law by resorting to a pejorative (Brief in Opp., at 15).

[6] Respondents do not address our further argument that it was not—and is not—clearly established that when a federal employee implements a federal program that may involve excessive actions, that employee thereby becomes a member of a conspiracy in which he is vicariously liable for the actions of every other employee who participates in the program. We therefore rely on the discussion of this issue in the Petition (at pp. 14-15).

[7] The district court held that under Section 1985(3), plaintiffs were entitled to recover if the animus was because "of their politi-

(footnote continued on next page)

Moreover, respondents themselves maintained that they would try the case on the basis that "the animus was according to political belief."[8] It was, of course, unnecessary for petitioners to object to an instruction the trial court had already ruled was legally correct.[9] That is why both the district court (Pet. App. 143a-144a) and the court of appeals (Pet. App. 32a-40a) had no doubt that the Section 1985(3) issue was properly before them.

Respondents assert that in any event the record contains sufficient evidence to demonstrate the presence of racial animus (Brief in Opp. 19-22). But the case was not tried on that basis and the jury was never asked to make a finding that these FBI defendants were motivated by racial animus (*see* notes 6 & 7, *supra*). Moreover, in attempting to fit this case into a racial mold, respondents engage in serious distortion. Claiming that "defendants then prepared" a racially inflammatory paper, they quote the paper at length (Brief in Opp. at 21). But as respondents well know, and as both the court of appeals (Pet. App. 38a-39a) and the district court (Pet. App. 171a) recognized, this document was not prepared by any of the

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(footnote cont.)

cal activities or associations." Final Pretrial Order, at p. 4 (Nov. 23, 1981). The court so charged the jury in an instruction quoted at page 10 of the Petition.

[8] Tr. 116 (Nov. 16, 1981). Respondents further contended, in response to the district court's inquiry, that "Yes, Your Honor, there is authority that a class designated by political belief does constitute a class for purposes of 1985(3)" *Id.* at 117.

[9] *See, e.g., Brown* v. *Avemco Investment Corp.*, 603 F.2d 1367, 1370-71 (9th Cir. 1979); *Stewart* v. *Ford Motor Co.*, 553 F.2d 130, 139-41 (D.C. Cir. 1977).

FBI defendants. Respondents may have intended to claim that these defendants were responsible for a paper written in New York by an unidentified "co-conspirator" agent because they were part of COINTELPRO. If this is their meaning, they have vividly demonstrated the danger of the conspiracy theory that has permeated this case.[10]

3. The court below determined that no FBI defendant was entitled to immunity. As we discussed in the Petition, the court reached this result because each FBI defendant had become a member of the COINTELPRO conspiracy and because COINTELPRO constituted a nationwide program in violation of clearly established constitutional rights (Pet. 13-15). This case thus presents the question whether, under *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), immunity determinations in civil rights conspiracy actions are to be made in light of the particular conduct of each individual defendant, as we have argued, or are to be made on the basis of a conspiracy doctrine rendering each defendant responsible for actions undertaken by any co-conspirator, as the court of appeals held.

Respondents have chosen not to confront the issue. They insist that it was "simply for convenience" that

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[10] The matter discussed in the text is not the only illustration. Respondents, for example, claim that COINTELPRO injured them by disrupting radio communications during a demonstration (Brief in Opp. 7). They fail to mention that none of the FBI defendants took part in such disruption and that there was no evidence that any of the FBI defendants had prior knowledge of these activities. Respondents also cite certain "press releases" regarding a non-party but fail to point out that there was no evidence that any such "press releases" were ever made public (Brief in Opp. at 20).

the court of appeals rejected defendants' immunity claims by determining that COINTELPRO violated clearly established rights (Brief in Opp. at 17). It is hardly certain what respondents intend to convey by their description of the court's holding. Without doubt, it is "convenient," particularly in a multiple defendant case, to assess each defendant's immunity claim in terms of what the "conspiracy" did; that dispenses with any need to engage in a separate evaluation of each defendant's conduct. But is is precisely such a separate evaluation that the principles of *Harlow* demand, as we argued in the Petition (at 13-14). Otherwise, individual accountability is lost and the floodgates are opened to the kind of extensive and disruptive litigating tactics that *Harlow* set iself against (Pet. 14).

To the extent that respondents are claiming that the court's immunity ruling represented an individualized inquiry of the sort *Harlow* requires, respondents are in error. The opinion never even hints that this was intended and the court's holding is as we have described it. Indeed, the court itself acknowledged "that the record reflects extraordinary variety in the level of participation of each [FBI] defendant" (Pet. App. 106a). The court could treat the defendants as a group for the purpose of determining immunity only because it viewed the conspiracy, not their particular conduct, as determinative. Moreover, the court's ruling on appeal followed a path clearly marked out at trial despite petitioners' strenuous objections that immunity must be decided separately with respect to each agent and *his* conduct, rather than on the basis that the acts

of all other co-conspirators are deemed to be those of the defendants.[11]

4. Respondents' treatment of the fraudulent concealment issue entirely misses the point. We contended that the fraudulent concealment doctrine cannot be invoked on the ground that the conspiracy itself was secret (Pet. 17-21). Otherwise, we argued, the statute of limitations would be emasculated in civil conspiracy cases since, as the Court held in *Grunewald* v. *United States,* 353 U.S. 391 (1957), conspiracies are by their nature secret (Pet. 18).

One obviously cannot answer our argument by asserting that the limitations period should be tolled because here the FBI conducted secret activities as part of the conspiracy. Yet that is essentially all respondents have to offer in their opposition (Brief in Opp. 25-28). They dismiss *Grunewald* on the basis that it was a criminal case and that when the Court

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[11] The jury was instructed, first, that each conspirator was liable for the injuries caused by other members of the conspiracy and next, that a defendant would be entitled to immunity only if "he reasonably and in good faith believed that the conduct for which he would otherwise be held liable was" lawful. Tr. 250, 260 (Dec. 17, 1981).

Petitioners had argued, in support of their motion for a directed verdict, that the immunity question should not be submitted to the jury on such a basis and sought a ruling that notions of vicarious liability must play no part in determining an agent's immunity from suit. To illustrate their point, petitioners' counsel asked the district court: "How does defendant Brennan prove good faith with regard to an event in which he was not involved? How does he prove that he was acting in good faith?" Tr. 326 (December 6, 1981).

declined to allow the secret nature of conspiracies to extend the limitations period, the Court did so for "policy reasons" (*id.* at 28 n. 2). Respondents fail to recognize that those policy reasons are as applicable to this case as they were in *Grunewald* and that we rely upon them (Pet. 15-18). Indeed, the reasoning of *Grunewald* has even greater force here since, as we have argued (Pet. 15-16), federal officers in the position of these FBI defendants rarely will be able to control whether or when their "conspiracy" should be revealed so as to start the limitations period running. Accordingly, only affirmative actions by such defendants to conceal a prior conspiracy should toll the statute. In this case the record reveals no such affirmative actions by these FBI defendants.[12]

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[12] Respondents do not address our contention (Pet. 21-22) that the court below also erred in failing to determine whether the fraudulent concealment doctrine was satisfied with respect to the individual actions against each defendant, as distinguished from the claims based on conspiracy.

Respondents also fail to discuss the conflict between the decision below and *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984), *certiorari granted*, (Oct. 1, 1984) (No. 83-2146).

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the petition for a writ of certiorari should be granted.

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